

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) JUNE 6, 2022
 RAMESH "SUNNY" BALWANI,)
) VOLUME 34
 DEFENDANT.)
) PAGES 6505 - 6572

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
KELLY VOLKAR
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP
BY: MOLLY MCCAFFERTY
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THE ORRICK BUILDING
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BY: JEFFREY COOPERSMITH
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701 FIFTH AVENUE, SUITE 5600
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BY: STEPHEN CAZARES
77 SOUTH FIGUEROA STREET, SUITE 3200
LOS ANGELES, CALIFORNIA 90017

BY: AMY WALSH
51 W 52ND STREET
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ALSO PRESENT:

OFFICE OF THE U.S. ATTORNEY
BY: MADDI WACHS, PARALEGAL
SARA SLATTERY, PARALEGAL

UNITED STATES POSTAL INSPECTION SERVICE
BY: CHRISTOPHER MCCOLLOM

FEDERAL BUREAU OF INVESTIGATION
BY: MARIO C. SCUSSEL

UNITED STATES FOOD & DRUG
ADMINISTRATION
BY: GEORGE SCAVDIS

1 SAN JOSE, CALIFORNIA

JUNE 6, 2022

2 P R O C E E D I N G S

09:28AM 3 (COURT CONVENED AT 9:28 A.M.)

09:28AM 4 (JURY OUT AT 9:28 A.M.)

09:28AM 5 THE COURT: WE'RE ON THE RECORD IN THE BALWANI
09:29AM 6 MATTER.

09:29AM 7 WHY DON'T I HAVE COUNSEL STATE THEIR APPEARANCE FOR TODAY,
09:29AM 8 PLEASE.

09:29AM 9 MR. SCHENK: GOOD MORNING, YOUR HONOR.

09:29AM 10 JEFF SCHENK ON BEHALF UNITED STATES.

09:29AM 11 I'M JOINED BY JOHN BOSTIC, ROBERT LEACH, AND KELLY VOLKAR.

09:29AM 12 THE COURT: THANK YOU. GOOD MORNING.

09:29AM 13 MR. COOPERSMITH: GOOD MORNING, YOUR HONOR.

09:29AM 14 JEFF COOPERSMITH REPRESENTING MR. BALWANI, WHO IS PRESENT.

09:29AM 15 I'M JOINED BY MY COLLEAGUES AMY WALSH AND STEPHEN CAZARES,
09:29AM 16 AND OTHER MEMBERS OF MY TEAM ARE IN THE GALLERY.

09:29AM 17 THE COURT: THANK YOU. GOOD MORNING. IT'S NICE TO
09:29AM 18 SEE EVERYONE ON THEIR FEET AND IN THE COURTROOM AFTER A SHORT
09:29AM 19 BREAK.

09:29AM 20 THE FIRST MATTER I WANTED TO MENTION WAS A CONVERSATION
09:29AM 21 THAT OUR COURTROOM DEPUTY HAD WITH ONE OF OUR JURORS, AND
09:29AM 22 REGRETTABLY ONE OF THE JURORS IS COVID POSITIVE, AND -- LET'S
09:29AM 23 SEE. WELL, I LEFT THE JURY LIST ON MY DESK, BUT IT IS JUROR --

09:30AM 24 THE CLERK: (HANDING.)

09:30AM 25 JUROR NUMBER 2.

09:30AM 1 THE COURT: JUROR NUMBER 2 APPARENTLY REPORTED COVID
09:30AM 2 POSITIVE.

09:30AM 3 WE HAVE -- I BEG YOUR PARDON. WE HAVE THREE ALTERNATES
09:30AM 4 THAT WE CAN DRAW FROM, AND I DID MENTION THIS THIS MORNING TO
09:30AM 5 COUNSEL, AND I ASKED YOU TO SPEAK WITH YOUR TEAMS ABOUT ANY
09:30AM 6 THOUGHTS THAT YOU HAD ABOUT HOW YOU WANTED TO PROCEED.

09:30AM 7 LET ME TURN TO THE GOVERNMENT FIRST.

09:30AM 8 MR. SCHENK: THANK YOU, YOUR HONOR.

09:30AM 9 IT'S THE GOVERNMENT'S RECOMMENDATION THAT WE REPLACE THIS
09:30AM 10 JUROR WITH THE NEXT ALTERNATE SO THAT WE MAY PROCEED THIS WEEK.

09:30AM 11 THE COURT: THANK YOU.

09:30AM 12 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

09:30AM 13 AND THE OBVIOUS CONCERN THAT WE HAVE, I'M SURE EVERYONE
09:30AM 14 SHARES, IS THAT WE NEVER WANT TO RISK DIPPING BELOW THE NUMBER
09:30AM 15 OF JURORS THAT ARE REQUIRED TO REACH A VERDICT IN THIS CASE
09:30AM 16 BECAUSE I DON'T THINK ANYONE WANTS TO DO THIS AGAIN FOR THAT
09:30AM 17 REASON.

09:30AM 18 BUT THAT SAID, WE DON'T HAVE AN OPPOSITION TO REPLACING
09:31AM 19 THE JUROR GIVEN THE CIRCUMSTANCES. WE'RE OBVIOUSLY JUST HOPING
09:31AM 20 THAT THIS DOESN'T KEEP ARISING, AND WE'RE MINDFUL THAT THERE IS
09:31AM 21 COVID IN THE COMMUNITY.

09:31AM 22 I THINK AT SOME POINT, YOU KNOW, WE WOULD HAVE TO DO
09:31AM 23 SOMETHING DIFFERENT.

09:31AM 24 BUT FOR THIS ONE, I THINK IT MAKES SENSE.

09:31AM 25 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

09:31AM 1 I DO RECOGNIZE, AT LEAST IN THE COUNTY, OUR COUNTY,
09:31AM 2 SANTA CLARA COUNTY HAS REIMPOSED MASK RESTRICTIONS AS FAR AS
09:31AM 3 GATHERINGS AND MASKS ARE REQUIRED NOW INSIDE OF BUILDINGS, I
09:31AM 4 THINK, FROM THE HEALTH DIRECTOR.

09:31AM 5 WE ARE DOING THAT. I DON'T KNOW IF YOU NOTICED WHEN YOU
09:31AM 6 CAME IN THE COURTHOUSE TODAY. THERE ARE SIGNS THAT SAY MASKS
09:31AM 7 REQUIRED, AND I SEE EVERYONE IS MASKED TODAY.

09:31AM 8 SO I DO THINK THAT IT IS PRUDENT TO STRIKE JUROR NUMBER 2,
09:31AM 9 IS IT, SHE'S NUMBER 2?

09:31AM 10 THE CLERK: SHE IS NOW, YOUR HONOR.

09:31AM 11 THE COURT: AND WE'LL THEN MOVE -- IT'S ALTERNATE
09:31AM 12 NUMBER 4. ALTERNATE NUMBER 4 WILL THEN BE MOVED TO REPLACE
09:32AM 13 THAT JUROR IN THAT SEAT.

09:32AM 14 AND WE WISH THAT JUROR A HEALTHY RECOVERY.

09:32AM 15 AND THEN WE CAN PROCEED -- OTHERWISE PROCEED WITH OUR
09:32AM 16 SCHEDULE.

09:32AM 17 ALL RIGHT. THANK YOU.

09:32AM 18 TODAY, THIS MORNING, WE HAVE DISCUSSION ON MR. BALWANI'S
09:32AM 19 MOTION, DOCKET 1470, MOTION TO ADMIT VARIOUS TRIAL EXHIBITS.

09:32AM 20 EXCUSE ME. I HAVE REVIEWED THAT.

09:32AM 21 AND I DON'T THINK THE GOVERNMENT FILED A FORMAL OPPOSITION
09:32AM 22 OR MEMO IN THAT REGARD.

09:32AM 23 MR. SCHENK?

09:32AM 24 MR. SCHENK: THAT'S CORRECT, YOUR HONOR.

09:32AM 25 I WILL CEDE THE MICROPHONE TO MY COLLEAGUE, MR. LEACH, WHO

09:32AM 1 IS PREPARED TO ADDRESS THAT ORALLY.

09:32AM 2 THE COURT: ALL RIGHT. THANK YOU.

09:32AM 3 I THOUGHT WE WOULD DISCUSS THIS THIS MORNING, AND THEN
09:32AM 4 PERHAPS ANY OTHER REMAINING ISSUES, INCLUDING SCHEDULING BASED
09:32AM 5 ON WHERE WE ARE NOW. I'D LIKE TO GET YOUR THOUGHTS ON THAT AS
09:33AM 6 WELL.

09:33AM 7 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

09:33AM 8 AND I WILL CEDE THE MICROPHONE TO MY COLLEAGUE, MS. WALSH.

09:33AM 9 THE COURT: GREAT.

09:33AM 10 IT'S NICE TO SEE YOU, MS. WALSH.

09:33AM 11 MS. WALSH: IT'S NICE TO SEE YOU, YOUR HONOR.

09:33AM 12 THE COURT: THANK YOU.

09:33AM 13 ALL RIGHT. THIS IS DOCKET 1470, MR. BALWANI'S MOTION TO
09:33AM 14 ADMIT VARIOUS TRIAL EXHIBITS. I THINK I HAVE THESE FLAGGED.

09:33AM 15 MS. WALSH, WHAT WOULD YOU LIKE TO SAY OR LIKE ME TO KNOW
09:33AM 16 ABOUT YOUR REQUEST?

09:33AM 17 MS. WALSH: YES, YOUR HONOR.

09:33AM 18 SO 1470 IS A MOTION TO ADMIT NINE DIFFERENT EXHIBITS,
09:33AM 19 WHICH WE INTEND TO OFFER THROUGH A WITNESS WHO IS A PARALEGAL
09:33AM 20 AT ORRICK, AND EACH OF THOSE -- I THINK WE SHOULD TAKE THEM ONE
09:33AM 21 BY ONE, BUT EACH OF THOSE CAN BE ADMITTED BECAUSE THEY ARE
09:34AM 22 AUTHENTIC EITHER PURSUANT TO STIPULATION OR OTHER RULES OF
09:34AM 23 EVIDENCE.

09:34AM 24 MANY ARE OFFERED FOR A NONHEARSAY PURPOSE, AND OTHERS FALL
09:34AM 25 WITHIN EXCEPTIONS, AND ALL OF THEM ARE RELEVANT TO ISSUES THAT

09:34AM 1 WE'VE SEEN DURING THE COURSE OF THE TRIAL.

09:34AM 2 SO I WOULD SUGGEST, YOUR HONOR, IF IT'S OKAY WITH YOU, IF
09:34AM 3 WE JUST TAKE THEM ONE BY ONE.

09:34AM 4 THE COURT: SURE. SURE.

09:34AM 5 ANYTHING YOU WANT TO SAY, MR. LEACH, THE GOVERNMENT WANTS
09:34AM 6 TO SAY IN ADVANCE OF OUR DISCUSSION?

09:34AM 7 MR. LEACH: THANK YOU, YOUR HONOR. GOOD MORNING.

09:34AM 8 I WOULD SAY THE GOVERNMENT HAS REVIEWED THE FILING. WE
09:34AM 9 DIDN'T FILE A WRITTEN OPPOSITION. WE DO OPPOSE ADMISSION OF
09:34AM 10 EXHIBITS 1, 2, 6, 8, AND 9. THOSE ARE THE EXHIBITS ATTACHED TO
09:34AM 11 THE -- MS. WALSH'S DECLARATION. I DON'T HAVE THE TRIAL EXHIBIT
09:34AM 12 NUMBER HANDY, BUT THOSE ARE THE EXHIBIT NUMBERS IN THE FILING.

09:34AM 13 SO LONG AS EXHIBITS 3, 4, 5, AND 7 ARE OFFERED FOR A
09:35AM 14 NONHEARSAY PURPOSE, THAT IS, THE LIMITED PURPOSE OF NOTICE TO
09:35AM 15 THE DEFENDANT OR ALLEGED NOTICE TO THE DEFENDANT, WE HAVE NO
09:35AM 16 OBJECTION TO 3, 4, 5, AND 7.

09:35AM 17 THE COURT: ALL RIGHT. THANK YOU FOR THAT.

09:35AM 18 MS. WALSH, LET'S TALK ABOUT 3, 4, 5, AND 7 THEN INITIALLY.

09:35AM 19 ARE YOU SEEKING TO ADMIT THESE SOLELY FOR THE ISSUE OF --
09:35AM 20 NOT FOR THE TRUTH OF THE MATTER ASSERTED OF EACH OF THESE, BUT
09:35AM 21 SOLELY AS TO THE ISSUE OF NOTICE TO YOUR CLIENT?

09:35AM 22 MS. WALSH: SO AS TO 3, 4, AND 5, THE ANSWER IS YES,
09:35AM 23 THEY WILL BE OFFERED ONLY FOR NOTICE TO MR. BALWANI.

09:35AM 24 AS TO 7, THIS IS THE FDA'S CLIA WAIVER FOR THERANOS'S
09:35AM 25 HSV-1 ASSAY, AND WE BELIEVE THAT IS ADMISSIBLE UNDER RULE

09:36AM 1 803(8), WHICH WOULD COME IN AS A HEARSAY EXCEPTION AND FOR ITS
09:36AM 2 TRUTH.

09:36AM 3 IN THE ALTERNATIVE CERTAINLY, CERTAINLY IT COULD COME IN,
09:36AM 4 IN OUR VIEW, AS TO NOTICE TO MR. BALWANI BECAUSE IT IS ATTACHED
09:36AM 5 TO AN EMAIL THAT IS SENT TO HIM.

09:36AM 6 THE COURT: OKAY. ALL RIGHT. IT SOUNDS LIKE WE'LL
09:36AM 7 HAVE SOME MORE DISCUSSION ON THAT ONE, ON 7.

09:36AM 8 BUT IN REGARDS TO 3, 4, AND 5 THEN, YOU'RE ASKING THAT
09:36AM 9 THOSE BE ADMITTED SOLELY FOR THE ISSUE OF NOTICE, THAT IS,
09:36AM 10 NOTICE TO MR. BALWANI AS TO WHAT ISSUE?

09:36AM 11 MS. WALSH: SO AS TO EXHIBIT 3, THAT IS AN EMAIL TO
09:36AM 12 MR. BALWANI REGARDING VARIOUS, AND THE NUMBER OF ASSAYS THAT
09:36AM 13 HAD BEEN DEVELOPED IN APRIL 2013, AND IT'S AN EMAIL FROM
09:37AM 14 DR. YOUNG TELLING MR. BALWANI THAT 95 PERCENT OF THE ASSAYS
09:37AM 15 LISTED WERE FINISHED AND THAT THEY WOULD BE BROUGHT -- THEY
09:37AM 16 WOULD BE SUBMITTED FOR CLIA VALIDATION.

09:37AM 17 SO WHAT IT IS RELEVANT TO, IT GOES TO MR. BALWANI'S STATE
09:37AM 18 OF MIND REGARDING HIS UNDERSTANDING THAT IN APRIL OF 2013,
09:37AM 19 THERANOS HAD DEVELOPED 95 PERCENT OF THE COMMONLY ORDERED
09:37AM 20 ASSAYS.

09:37AM 21 THROUGHOUT THE TRIAL IN THIS CASE, THE GOVERNMENT HAS
09:37AM 22 POINTED OUT THAT ONLY 12 ASSAYS WERE AVAILABLE ON THE EDISON
09:37AM 23 AND THERE WERE A LIMITED NUMBER OF ASSAYS THAT WERE AVAILABLE
09:37AM 24 FOR PATIENT TESTING, AND THIS EMAIL ESTABLISHES THAT, AT LEAST
09:37AM 25 AS FAR AS MR. BALWANI WAS CONCERNED, HE WAS ON NOTICE THAT

09:38AM 1 THERE WERE MANY ASSAYS THAT HAD BEEN DEVELOPED FOR THE CLIA
09:38AM 2 LAB.

09:38AM 3 THE COURT: SO THIS IS NOTICE AS TO MR. BALWANI ON
09:38AM 4 THE -- AT LEAST AS OF THE DATE OF THE EMAIL, APRIL 21, 2013,
09:38AM 5 AND THOSE DATES AS TO THE STATUS OF DEVELOPMENT OF TESTING.

09:38AM 6 MS. WALSH: THAT'S RIGHT, YOUR HONOR, ASSAY
09:38AM 7 DEVELOPMENT.

09:38AM 8 THE COURT: MR. LEACH.

09:38AM 9 MR. LEACH: YOUR HONOR, I THINK THAT
09:38AM 10 OVERSTATES PRETTY DRAMATICALLY THE PROBATIVE VALUE OF THE
09:38AM 11 EVIDENCE.

09:38AM 12 THERE'S NO EVIDENCE THAT MR. BALWANI READ THIS OR PAID ANY
09:38AM 13 ATTENTION TO IT, AND THERE'S NO CONTEXT TO THIS STRAY EMAIL
09:38AM 14 FROM APRIL OF 2013.

09:38AM 15 ALL OF THAT SAID, THIS WAS SOMETHING THAT HE RECEIVED. IF
09:38AM 16 THEY WANT TO ARGUE THIS WAS NOTICE OF A PARTICULAR FACT, I'M
09:38AM 17 NOT GOING TO QUIBBLE WITH ITS ADMISSION, BUT I'D PREFER NOT TO
09:39AM 18 GET SPECIFIC ON THE GRANULARITY OF THE NOTICE BECAUSE I HAVE NO
09:39AM 19 REASON TO THINK THAT MR. BALWANI READ THIS.

09:39AM 20 I THINK THIS IS TAKEN OUT OF CONTEXT. I THINK THERE'S A
09:39AM 21 MUCH DEEPER STORY TO THIS.

09:39AM 22 BUT IT PASSED THROUGH HIS IN BOX, AND I THINK ON THAT
09:39AM 23 BASIS WE'RE NOT GOING TO OBJECT TO THIS PARTICULAR EMAIL.

09:39AM 24 BUT I WOULD NOT WANT TO SUGGEST TO THE JURY THAT IT'S ANY
09:39AM 25 MORE THAN THAT.

09:39AM 1 THE COURT: WELL, WHAT DO I -- I NOTICED -- THANK
09:39AM 2 YOU. I NOTICED THAT THERE'S AN EMAIL FROM MR. -- ATTRIBUTED
09:39AM 3 FROM MR. BALWANI ON APRIL 19TH SANDWICHED BETWEEN THESE TWO,
09:39AM 4 MR. YOUNG'S EMAILS.

09:39AM 5 AND WHEN I HAVE PREVIOUSLY ADMITTED EVIDENCE FOR NOTICE, I
09:39AM 6 BELIEVE I HAVE INFORMED THE JURY NOTICE OF SOMETHING. I THINK
09:39AM 7 WE NEED TO FILL THAT VACUUM IN SOME MANNER, AND THAT'S WHY I'M
09:39AM 8 ASKING, WHAT IS THIS A NOTICE FOR? NOTICE OF LAB SITUATION?
09:40AM 9 NOTICE OF THE -- AT LEAST AS OF THIS DATE AND TIME, HIS NOTICE
09:40AM 10 OF LAB DEVELOPMENT, LAB PROCEDURES?

09:40AM 11 I'M OPEN TO DISCUSSING IT.

09:40AM 12 MR. LEACH: SORRY, YOUR HONOR.

09:40AM 13 THE COURT: NO, NO.

09:40AM 14 MR. LEACH: IF I COULD SUGGEST IT BE NO MORE THAN
09:40AM 15 NOTICE AS TO THE MATTERS SET FORTH IN THE EMAIL AS OF THAT
09:40AM 16 DATE, I THINK THAT WOULD --

09:40AM 17 THE COURT: SURE.

09:40AM 18 MR. LEACH: -- AVOID WHAT I THINK ARE PRETTY DEEP
09:40AM 19 DISAGREEMENTS OVER HOW PROBATIVE THIS PARTICULAR EMAIL IS.

09:40AM 20 THE COURT: THE SUBJECT LINE IS ASSAYS FOR FDA
09:40AM 21 FILING. SHOULD WE SAY THAT?

09:40AM 22 MR. LEACH: YES.

09:40AM 23 MS. WALSH: SO, YOUR HONOR, I WOULDN'T SAY THAT
09:40AM 24 ACTUALLY.

09:40AM 25 I AGREE WITH MR. LEACH THAT THE CONTENT OF THE EMAIL IS

09:41AM 1 SUFFICIENT, AND THE PARTIES CAN MAKE VARIOUS ARGUMENTS BASED ON
09:41AM 2 THE WEIGHT ONCE IT COMES IN AS TO WHAT THE EMAIL MEANS.

09:41AM 3 I THINK THE CONTENT IS DIFFERENT FROM THE SUBJECT LINE.
09:41AM 4 THE CONTENT RELATES TO CLIA VALIDATION, WHEREAS THE SUBJECT
09:41AM 5 LINE RELATES TO ASSAYS FOR FDA FILING.

09:41AM 6 SO AS MR. LEACH POINTED OUT, I WOULDN'T WANT -- MAYBE
09:41AM 7 THAT'S TOO SPECIFIC TO LIST THE SUBJECT LINE.

09:41AM 8 I THINK WHAT YOUR HONOR PROPOSED, OR MAYBE IT WAS
09:41AM 9 MR. LEACH WHO PROPOSED IT, MAKES THE MOST SENSE. IT GOES TO
09:41AM 10 MR. BALWANI'S STATE OF MIND AS TO WHAT IS IN THIS EMAIL.

09:41AM 11 MR. LEACH: YOUR HONOR, I THINK MS. WALSH'S
09:41AM 12 STATEMENT JUST PROVES THE HAZARD OF TRYING TO GET TOO GRANULAR
09:41AM 13 ON THIS, BECAUSE I DON'T THINK IT APPLIES TO CLIA VALIDATION.

09:41AM 14 I THINK, JUST ME READING WHAT DR. YOUNG IS SAYING, AND
09:41AM 15 DR. YOUNG HAS NOT TESTIFIED, IS THAT HE'S TALKING ABOUT 75
09:41AM 16 WHOLE BLOOD TESTS THAT ARE STILL UNDER DEVELOPMENT, A REMAINDER
09:42AM 17 THAT NEED INTEGRATION ON THE DEVICE, AND ALL OF THIS IS A
09:42AM 18 PRELUDE TO CLIA VALIDATION.

09:42AM 19 SO --

09:42AM 20 THE COURT: PARDON ME. IS THIS AN EMAIL REGARDING A
09:42AM 21 NOTICE OF A DISCUSSION REGARDING THE VALIDATION PROCESS, THE
09:42AM 22 VALIDATION PROTOCOL?

09:42AM 23 I'M WORDSMITHING HERE WHILE WE'RE TALKING.

09:42AM 24 MS. WALSH: I THINK THE VALIDATION PROCESS IS AN
09:42AM 25 APPROPRIATE WAY TO CHARACTERIZE IT.

09:42AM 1 THE COURT: A LAB PROCESS.

09:42AM 2 MR. LEACH: I THINK THERE'S A NUMBER OF WAYS TO READ
09:42AM 3 THIS EMAIL, YOUR HONOR, AND THAT THE COURT TRYING TO BE
09:42AM 4 GRANULAR ON THE PARTICULAR TYPE OF NOTICE MIGHT DO SOME HAZARD
09:42AM 5 TO BOTH SIDE'S POSITIONS, AND I THINK WE'RE MUCH MORE
09:42AM 6 COMFORTABLE WITH THE MATTERS SET FORTH IN THE EMAIL.

09:42AM 7 THE COURT: AND I CERTAINLY DON'T WANT TO INTRUDE ON
09:43AM 8 ANYTHING -- ANY OF YOUR INTENTS IN THIS AT ALL. I WANT TO BE
09:43AM 9 AS NEUTRAL AS I CAN AS TO TELL THE JURY WHAT THIS IS, AND IF
09:43AM 10 THIS IS FOR NOTICE OF THE MATTERS THAT ARE CONTAINED IN THE
09:43AM 11 EMAIL, DOES THAT PERMIT YOU TO ARGUE THAT IT'S A CLIA? I THINK
09:43AM 12 IT DOES.

09:43AM 13 MS. WALSH: SURE. YES, YOUR HONOR.

09:43AM 14 THE COURT: SO LET'S DO THAT, NOTICE OF ITEMS
09:43AM 15 CONTAINED IN THE EMAIL. THANK YOU.

09:43AM 16 ALL RIGHT. SHOULD WE HAVE THE SAME DISCUSSION FOR 4 AND 5
09:43AM 17 IN REGARDS TO NOTICE?

09:43AM 18 MR. LEACH: YES, YOUR HONOR.

09:44AM 19 THE COURT: AND 4?

09:44AM 20 MS. WALSH: YES.

09:44AM 21 REGARDING 4, THIS IS NOTICE TO MR. BALWANI AS TO
09:44AM 22 DR. SAKSENA'S PROGRESS IN BECOMING THE FULL-TIME LAB DIRECTOR
09:44AM 23 AT THE NEWARK LAB IN JULY 2015, WHICH IS THE DATE OF THE EMAIL.

09:44AM 24 MR. LEACH: AGAIN, YOUR HONOR, I DISAGREE THAT IT'S
09:44AM 25 EXACTLY THE NOTICE THAT MS. WALSH JUST DESCRIBED.

09:44AM 1 THIS EMAIL APPEARS TO BE SOMETHING THAT DR. SAKSENA
09:44AM 2 FORWARDED TO MR. BALWANI IN JULY OF 2015 REGARDING AN
09:44AM 3 APPLICATION TO BE A CLINICAL LABORATORY DIRECTOR.

09:44AM 4 THERE'S NO CONTEXT IN THE EMAIL OF WHY HE WAS DOING THIS
09:44AM 5 OR EXACTLY WHAT HE WANTED TO DO WITH THE LICENSURE.

09:44AM 6 I THINK THE DEFENSE WANTS TO ARGUE THAT THIS IS RELEVANT
09:44AM 7 TO MR. BALWANI'S STATE OF MIND THAT DR. SAKSENA SOME DAY WOULD
09:45AM 8 BECOME A LAB DIRECTOR AT THERANOS.

09:45AM 9 I THINK IF WE'RE TALKING ABOUT WHAT THIS IS NOTICE OF, I
09:45AM 10 THINK LIMITING IT TO THE SUBJECT LINE OF THE EMAIL WOULD
09:45AM 11 SUFFICE FOR THE GOVERNMENT.

09:45AM 12 THE COURT: CLINICAL LAB DIRECTOR APPLICATION?

09:45AM 13 MS. WALSH: YES. THAT'S FINE, YOUR HONOR.

09:45AM 14 AND, OF COURSE, WE'LL MAKE ARGUMENTS BASED ON THE OTHER
09:45AM 15 EVIDENCE IN THE CASE.

09:45AM 16 THE COURT: SURE.

09:45AM 17 MS. WALSH: BUT AS FAR AS YOUR INSTRUCTION TO THE
09:45AM 18 JURY, WE ARE FINE WITH THAT.

09:45AM 19 THE COURT: MR. LEACH.

09:45AM 20 MR. LEACH: I'M SORRY, COULD THE COURT SAY THAT ONE
09:45AM 21 MORE TIME?

09:45AM 22 THE COURT: THE SUBJECT MATTER ON AT LEAST THE TOP
09:45AM 23 EMAIL ON PAGE 13, ECF 13, READS, "SURAJ SAKSENA," COLON, AND
09:45AM 24 WHAT I WOULD SAY IS "NOTICE REGARDING CLINICAL LAB DIRECTOR
09:46AM 25 APPLICATION."

09:46AM 1 MR. LEACH: THAT'S FINE, YOUR HONOR.

09:46AM 2 THE COURT: SO I WOULD TELL THE JURY THAT THIS WOULD

09:46AM 3 BE ADMITTED NOT FOR THE TRUTH OF THE MATTERS ASSERTED IN THE

09:46AM 4 EMAILS, BUT AS TO THE ISSUE OF NOTICE OF MR. BALWANI AS TO THE

09:46AM 5 CLINICAL LAB DIRECTOR APPLICATION.

09:46AM 6 MR. LEACH: I WOULD SAY A CLINICAL LABORATORY.

09:46AM 7 THE COURT: THAT'S FINE.

09:46AM 8 MS. WALSH?

09:46AM 9 MS. WALSH: THAT'S FINE, YOUR HONOR.

09:46AM 10 THE COURT: OKAY.

09:46AM 11 AND THEN 5.

09:46AM 12 MS. WALSH: SO WHAT WE WOULD PROPOSE FOR 5 IS THAT

09:46AM 13 THIS IS OFFERED FOR NOTICE TO MR. BALWANI REGARDING THERANOS'S

09:46AM 14 RELATIONSHIP WITH GLAXOSMITHKLINE, WHICH IS THE PHARMA COMPANY

09:47AM 15 IN THE EMAIL.

09:47AM 16 I THINK THAT'S RELATIVELY SIMPLE AND STRAIGHTFORWARD AND

09:47AM 17 WE CAN MAKE OUR ARGUMENTS BASED ON THE CONTENTS OF THE EMAIL

09:47AM 18 FROM THERE.

09:47AM 19 THE COURT: MR. LEACH.

09:47AM 20 MR. LEACH: YOUR HONOR, SO THIS IS AN EMAIL FROM

09:47AM 21 ELIZABETH HOLMES TO SOMEONE NAMED THOMAS BREWER AT GSKBIO.COM.

09:47AM 22 THERE'S ZERO TESTIMONY ABOUT WHO MR. BREWER IS.

09:47AM 23 IT'S COPIED TO MR. BALWANI AND THERE'S A NUMBER OF VERY

09:47AM 24 LENGTHY ATTACHMENTS TO THIS.

09:47AM 25 I THINK IF THIS IS COMING IN FOR NOTICE TO THE DEFENDANT,

09:47AM 1 IT SHOULD BE LIMITED TO THE SUBJECT MATTER SET FORTH IN THE
09:47AM 2 EMAIL AND NOTHING MORE.

09:47AM 3 THE COURT: HAS THERE BEEN TESTIMONY REGARDING
09:47AM 4 WHETHER OR NOT MR. BALWANI WAS A PARTICIPANT IN ANY MEETING
09:48AM 5 WITH MR. BREWER?

09:48AM 6 MR. LEACH: NO.

09:48AM 7 MS. WALSH: NO, YOUR HONOR.

09:48AM 8 BUT THERE'S BEEN PLENTY OF TESTIMONY ABOUT RELATIONSHIPS
09:48AM 9 WITH OTHER PHARMA COMPANIES AND EMAILS THAT WENT TO MR. BALWANI
09:48AM 10 WITH LOGOS AND REPORTS WITHOUT LOGOS AND WITNESSES TESTIFYING
09:48AM 11 THAT WE DIDN'T VALIDATE THERANOS TECHNOLOGY, AND THIS IS A
09:48AM 12 DOCUMENT THAT REBUTS SOME OF THOSE CLAIMS.

09:48AM 13 IT'S AN EMAIL FROM ELIZABETH HOLMES TO SOMEONE AT
09:48AM 14 GLAXOSMITHKLINE, COPYING MR. BALWANI, SAYING IN THE EMAIL
09:48AM 15 THAT -- DESCRIBING THE THERANOS TECHNOLOGY.

09:48AM 16 IN THE POWERPOINT AT PAGE 23 OF THE DOCUMENT, IT SAYS,
09:48AM 17 "GSK COMPLETED A COMPREHENSIVE VALIDATION OF THERANOS SYSTEMS
09:48AM 18 IN 2008."

09:48AM 19 THAT WAS BEFORE MR. BALWANI GOT TO THE COMPANY. THAT GOES
09:48AM 20 DIRECTLY TO HIS STATE OF MIND REGARDING THERANOS'S RELATIONSHIP
09:49AM 21 WITH PHARMA COMPANIES.

09:49AM 22 THE COURT: THANK YOU. SO THIS IS NOTICE TO
09:49AM 23 MR. BALWANI OF AN EMAIL FROM MS. HOLMES TO MR. BREWER REGARDING
09:49AM 24 THEIR MEETING.

09:49AM 25 MS. WALSH: CORRECT, WITH ATTACHMENTS.

09:49AM 1 MR. LEACH: THAT'S FINE, YOUR HONOR.

09:49AM 2 THE COURT: OKAY.

09:49AM 3 MS. WALSH: AND JUST SO I'M CLEAR, YOUR HONOR, WE

09:49AM 4 ARE OFFERING THE ENTIRE EXHIBIT.

09:49AM 5 THE COURT: THAT WAS MY UNDERSTANDING.

09:49AM 6 MS. WALSH: YES.

09:49AM 7 MR. LEACH: I UNDERSTOOD THAT, TOO.

09:50AM 8 (PAUSE IN PROCEEDINGS.)

09:50AM 9 THE COURT: ALL RIGHT. THANK YOU. WITH THOSE

09:50AM 10 CAVEATS AS TO WHAT THE COURT WILL INFORM THE JURY REGARDING

09:50AM 11 NOTICE, THOSE WILL BE ADMITTED, AND I WILL INFORM THE JURY AS

09:50AM 12 TO THE PURPOSE OF THE NOTICE FOR 3, 4, AND 5.

09:50AM 13 AND SHOULD WE DISCUSS 7 NOW? IT'S IN THAT SAME SET.

09:50AM 14 MR. LEACH: SURE, YOUR HONOR.

09:50AM 15 THE COURT: MS. WALSH, I THINK YOU'RE SUGGESTING

09:50AM 16 THIS IS A PUBLIC RECORD OR IT FALLS WITHIN THE EXCEPTION OF

09:50AM 17 803(8), WHICH IS THE PUBLIC RECORDS EXCEPTION.

09:51AM 18 MS. WALSH: THAT'S RIGHT, YOUR HONOR.

09:51AM 19 THE COURT: OKAY. WHAT SHOULD WE KNOW ABOUT THAT?

09:51AM 20 MS. WALSH: SO IT IS A LETTER FROM THE FDA TO

09:51AM 21 MR. ARINGTON OF THERANOS, AND IT -- THEREFORE, IT'S A STATEMENT

09:51AM 22 OF A PUBLIC OFFICE.

09:51AM 23 AND I'M JUST GOING THROUGH THE ELEMENTS OF THE RULE, AND

09:51AM 24 IT'S -- IT REPORTS A MATTER OBSERVED WHILE UNDER A LEGAL DUTY

09:51AM 25 TO REPORT.

09:51AM 1 IT'S ISSUING -- IT'S ESSENTIALLY SAYING TO THERANOS, YOUR
09:51AM 2 APPLICATION FOR WAIVED STATUS UNDER THE CLIA REGULATIONS WAS
09:51AM 3 GRANTED. THAT'S -- IT'S INFORMING THERANOS OF THAT FACT.

09:51AM 4 THE COURT: AND THIS IS ECF PAGE 150. IT'S TRIAL
09:51AM 5 EXHIBIT 20826, PAGE 2?

09:51AM 6 MS. WALSH: YES, YOUR HONOR.

09:51AM 7 THE COURT: AND IS THAT THE EXTENT OF WHAT YOU WANT
09:52AM 8 TO GET IN, OR IS IT PAGE 1 AS WELL, THE EMAILS?

09:52AM 9 MS. WALSH: PAGE 1 AS WELL. AND PAGE 1 IS IMPORTANT
09:52AM 10 BECAUSE MR. BALWANI IS ON THE EMAIL THAT MR. ARINGTON FORWARDS
09:52AM 11 WITH THE CLIA WAIVER ATTACHED.

09:52AM 12 THE COURT: THE FIRST EMAIL I SEE ON THE LIST IS
09:52AM 13 FROM MR. BALWANI, JULY 15TH, 2015.

09:52AM 14 IS THAT --

09:52AM 15 MS. WALSH: CORRECT. I DON'T THINK THAT'S CRITICAL.

09:52AM 16 IT'S REALLY THE NEXT ONE FROM MR. ARINGTON TO MS. HOLMES,
09:52AM 17 MR. BALWANI, AND HEATHER KING, WHICH SAYS, "JUST CAME IN."

09:52AM 18 AND THAT'S WHAT'S ATTACHED.

09:52AM 19 THE COURT: I SEE. AND HE'S FORWARDING THE LETTER
09:52AM 20 FROM PETER TOBIN?

09:52AM 21 MS. WALSH: CORRECT.

09:53AM 22 THE COURT: MR. LEACH.

09:53AM 23 MR. LEACH: YOUR HONOR, WE HAVE NO OBJECTION TO THIS
09:53AM 24 EMAIL COMING IN FOR NOTICE TO MR. BALWANI OF A CLIA WAIVER
09:53AM 25 GRANTED NOTIFICATION.

09:53AM 1 WE DO OBJECT TO THE EMAIL COMING IN FOR THE TRUTH OF THE
09:53AM 2 MATTER ASSERTED.

09:53AM 3 I'M A LITTLE SURPRISED TO HEAR THE DEFENSE ARGUE THAT THE
09:53AM 4 PUBLIC RECORDS EXCEPTION TO THE HEARSAY RULE CAN BE LAID
09:53AM 5 WITHOUT A WITNESS TO LAY THE FOUNDATION FOR THE PARTICULAR
09:53AM 6 ELEMENTS.

09:53AM 7 I THINK WHEN WE WERE OFFERING THE CMS INSPECTION REPORT,
09:53AM 8 HAD WE JUST OFFERED THAT IN THE ETHER THROUGH A PARALEGAL,
09:53AM 9 THERE CERTAINLY WOULD HAVE BEEN AN OBJECTION THAT THAT HEARSAY
09:53AM 10 EXCEPTION HAD NOT WITHIN BEEN SATISFIED.

09:53AM 11 THAT HOLDS TRUE FOR THE DEFENSE IN THEIR CASE.

09:53AM 12 THERE'S NOBODY FROM THE FDA TO EXPLAIN WHAT THIS IS, HOW
09:53AM 13 IT WAS PREPARED, WHETHER IT'S TRUE, WHETHER THERE WAS A PUBLIC
09:53AM 14 DUTY OR A LEGAL DUTY, WHETHER THESE WERE, IN FACT, MATTERS
09:53AM 15 OBSERVED IN THE COURSE OF THEIR BUSINESS, AND WITHOUT AN FDA
09:54AM 16 WITNESS TO LAY THAT FOUNDATION, I DON'T THINK IT'S APPROPRIATE
09:54AM 17 TO USE THE PUBLIC RECORDS EXCEPTION AS A BASIS TO ADMIT THIS
09:54AM 18 FOR THE TRUTH OF THE MATTER ASSERTED.

09:54AM 19 THE COURT: SO IN THE PAST YOUR STIPULATION COVERS
09:54AM 20 AUTHENTICITY, BUT IT DOESN'T COVER THE OTHER BASES FOR
09:54AM 21 ADMISSIONS AS I UNDERSTAND IT, AS I RECALL.

09:54AM 22 MR. LEACH: THAT'S CORRECT, YOUR HONOR. BOTH
09:54AM 23 PARTIES RESERVED HEARSAY OBJECTIONS.

09:54AM 24 THE COURT: RIGHT.

09:54AM 25 MR. LEACH: AND OUR OBJECTION IS HEARSAY.

09:54AM 1 THE COURT: RIGHT.

09:54AM 2 WHAT I HEAR MR. LEACH SAYING -- YOU DID, TOO -- THAT THERE
09:54AM 3 HAS TO BE A FOUNDATIONAL WITNESS OF SOME SORT TO LAY THE
09:54AM 4 FOUNDATION FOR THE PUBLIC RECORD.

09:54AM 5 MS. WALSH: I UNDERSTAND, YOUR HONOR.

09:54AM 6 AND I GUESS -- THIS IS A LETTER ON THE LETTERHEAD OF THE
09:54AM 7 FDA. I DON'T THINK THERE'S AN ISSUE THAT IT'S AUTHENTIC.

09:54AM 8 THE COURT: RIGHT. RIGHT. I THINK YOUR STIPULATION
09:55AM 9 COVERS THAT.

09:55AM 10 MS. WALSH: RIGHT.

09:55AM 11 SO IT SEEMS TO ME, ON ITS FACE, SINCE IT'S REPORTING THE
09:55AM 12 CLIA -- THE WAIVED STATUS OF THIS ASSAY, IT ISN'T LIKE THERE'S
09:55AM 13 A COMPLICATED ANALYSIS THAT HAS TO TAKE PLACE TO BE ABLE TO
09:55AM 14 READ THIS AND SAY THE FDA IS REPORTING THIS, AS PART OF ITS
09:55AM 15 JOB, THAT THERANOS GOT A CLIA WAIVER.

09:55AM 16 I DON'T THINK WE DO NEED A WITNESS TO ESTABLISH THAT. I
09:55AM 17 THINK IT'S CLEAR ON THE FACE OF THE DOCUMENT.

09:55AM 18 MR. LEACH: THAT COULD BE TRUE OF ANY DOCUMENT,
09:55AM 19 YOUR HONOR, THAT COMES FROM THE FDA, OR FOR THAT MATTER IF IT
09:55AM 20 COMES FROM CMS.

09:55AM 21 IT'S BEING OFFERED FOR THE TRUTH OF THE STATEMENTS IN THIS
09:55AM 22 LETTER. FOR EXAMPLE, WAIVED STATUS AS APPLICABLE TO TEST
09:55AM 23 SYSTEMS AND THEIR INSTRUCTIONS ARE APPROVED OR CLEARED.

09:55AM 24 THAT'S A FACTUAL ASSERTION THAT THE DEFENDANT WANTS TO
09:55AM 25 MAKE. IF HE WANTS TO MAKE THAT, HE NEEDS TO LAY THE FOUNDATION

09:56AM 1 FOR THE PUBLIC RECORDS EXCEPTION, AND SIMPLY SAYING THIS IS
09:56AM 2 WHAT THE DOCUMENT SAYS IS NOT A PROPER WAY TO DO THAT.

09:56AM 3 I WOULD SAY THIS ALSO IS CUMULATIVE IN THE SENSE THAT
09:56AM 4 DAN EDLIN TESTIFIED THAT IN JULY OF 2015 THERANOS LEARNED OF
09:56AM 5 SOME FORM OF FDA APPROVAL FOR ITS HERPES VACCINE.

09:56AM 6 THIS ADDS A LOT OF COMPLICATED DETAIL ABOUT WHAT THESE
09:56AM 7 TERMS MEAN AND WHAT EXACTLY THE FDA DID TO REACH THE JUDGMENTS
09:56AM 8 SET FORTH IN THIS LETTER, AND I SIMPLY DON'T THINK THAT IT'S
09:56AM 9 APPROPRIATE TO SAY, LOOK AT THE DOCUMENT, THE HEARSAY EXCEPTION
09:56AM 10 IS SATISFIED.

09:56AM 11 THEY SHOULD HAVE A WITNESS, EITHER FROM THERANOS OR THE
09:56AM 12 FDA, TO -- AND I DON'T CONCEDE SOMEONE FROM THERANOS CAN DO
09:56AM 13 THAT -- BUT A WITNESS OTHER THAN AN ORRICK PARALEGAL TO LAY THE
09:56AM 14 FOUNDATION FOR THE HEARSAY EXCEPTION.

09:56AM 15 EVERYTHING THAT MS. WALSH HAS SAID IS EQUALLY TRUE OF THE
09:57AM 16 CMS INSPECTION REPORT. THERE'S NO WAY ON EARTH THAT THEY WOULD
09:57AM 17 HAVE PERMITTED THAT TO COME IN WITHOUT SOME LEVEL OF
09:57AM 18 FOUNDATION, AND THOSE EXACT SAME PRINCIPLES APPLY HERE.

09:57AM 19 MS. WALSH: MAY I BE HEARD ON THAT, YOUR HONOR?

09:57AM 20 THE COURT: YES.

09:57AM 21 MS. WALSH: SO ON PAGES 7 THROUGH 8 OF OUR BRIEF
09:57AM 22 1470, IT SETS FORTH A CASE, UNITED STATES VERSUS
09:57AM 23 LOYOLA-DOMINGUEZ, FROM THE NINTH CIRCUIT THAT SAYS THAT THE
09:57AM 24 PUBLIC RECORDS EXCEPTION IS ONE OF THE FEW HEARSAY EXCEPTIONS
09:57AM 25 THAT DOES NOT REQUIRE A FOUNDATION.

09:57AM 1 INSTEAD, DOCUMENTS THAT FALL UNDER THE PUBLIC RECORDS
09:57AM 2 EXCEPTION ARE PRESUMED TRUSTWORTHY, PLACING THE BURDEN OF
09:57AM 3 UNTRUSTWORTHINESS ON THE OPPONENT OF THE EVIDENCE.

09:57AM 4 AND I THINK THAT'S EXACTLY WHAT IS THE CASE HERE, THAT ON
09:57AM 5 THE FACE OF THIS DOCUMENT, YOU DON'T NEED A WITNESS TO MEET THE
09:57AM 6 HEARSAY EXCEPTION HERE.

09:57AM 7 I'M SORRY, JUST ONE MORE THING AS FAR AS THE CITATION TO
09:57AM 8 MR. EDLIN.

09:58AM 9 MR. EDLIN DID TESTIFY ABOUT THE FDA CLEARANCE. MY
09:58AM 10 RECOLLECTION IS THAT HE DIDN'T TALK ABOUT THE CLIA WAIVER.

09:58AM 11 AND THE CLIA WAIVER IS RELEVANT BECAUSE IT RELATES TO
09:58AM 12 THERANOS'S MOVING INTO PHASE II OF ITS BUSINESS MODEL, WHICH WE
09:58AM 13 HEARD ABOUT THROUGH TESTIMONY, PHASE II BEING MOVING FROM THE
09:58AM 14 CENTRAL LAB MODEL WHERE THE SAMPLES ARE SENT FROM WALGREENS TO
09:58AM 15 THERANOS TO BE TESTED, TO PLACING THE DEVICES IN THE STORES.
09:58AM 16 AND THE CLIA WAIVER IS THE MECHANISM AND THE TOOL TO ENABLE
09:58AM 17 THAT TO HAPPEN.

09:58AM 18 THE COURT: SO IS THERE SOME AMBIGUITY IN THIS? DO
09:59AM 19 WE HAVE -- IS THERE A VACUUM HERE THAT -- THE FIRST PARAGRAPH
09:59AM 20 OF THE LETTER SAYS THAT "WE'RE PLEASED TO INFORM YOU THAT YOUR
09:59AM 21 TEST SYSTEM AS IDENTIFIED BELOW IS WAIVED," AND THEN IT SAYS,
09:59AM 22 "SEE ATTACHMENT."

09:59AM 23 MS. WALSH: RIGHT.

09:59AM 24 MR. LEACH: THERE IS --

09:59AM 25 MS. WALSH: THERE IS AN ATTACHMENT.

09:59AM 1 THE COURT: WHICH IS THE ATTACHMENT?

09:59AM 2 MS. WALSH: PAGE 3 -- ACTUALLY PAGE 151 OF THE

09:59AM 3 DOCKET FILING.

09:59AM 4 THE COURT: THE PATENT NUMBER KL43236?

09:59AM 5 MS. WALSH: YEAH. IT'S ACTUALLY A PARENT NUMBER.

09:59AM 6 THE COURT: OH, PARENT NUMBER, I PEG YOUR PARDON.

09:59AM 7 THIS IS THE ATTACHMENT AND THIS IS PART OF THE SAME

09:59AM 8 EXHIBIT?

09:59AM 9 MS. WALSH: CORRECT.

09:59AM 10 THE COURT: AND IT SAYS, "TEST SYSTEM ANALYTE

09:59AM 11 COMPLEXITY." I SEE. OKAY.

10:00AM 12 DOES 803(8) (B) SUGGEST THAT THE OPPONENT HAS AN OBLIGATION

10:00AM 13 TO SHOW THAT THE SOURCE OF INFORMATION OR OTHER CIRCUMSTANCES

10:00AM 14 INDICATE THE LACK OF TRUSTWORTHINESS? IS THAT WHAT THAT TELLS

10:00AM 15 US? AND THAT'S THE ISSUE HERE, I THINK, REGARDING THIS

10:00AM 16 EXCEPTION.

10:00AM 17 AND WHAT I, WHAT I HEARD US TALK ABOUT WAS THE

10:00AM 18 AUTHENTICITY IS NOT AT ISSUE, AND SO FOR HEARSAY ONE OF THE

10:00AM 19 QUESTIONS IS WHETHER OR NOT THERE IS A RELIABILITY, A CONCERN

10:01AM 20 ABOUT THE RELIABILITY, AUTHENTICITY OF IT.

10:01AM 21 THIS EXCEPTION SAYS, WELL, IT'S A PUBLIC RECORD OF, IN

10:01AM 22 THIS CASE, THE FEDERAL GOVERNMENT. THE RELIABILITY SHOULD NOT

10:01AM 23 BE QUESTIONED BECAUSE IT'S AN FDA LETTER, AND THERE'S NO

10:01AM 24 QUESTION THAT THE LETTER IS FABRICATED OR OTHERWISE OTHER THAN

10:01AM 25 AUTHENTIC.

1 MR. LEACH: I'M NOT ARGUING, YOUR HONOR, THAT THE
2 LETTER IS NOT WHAT IT APPEARS TO BE.

3 I AM ARGUING THAT THERE IS NUANCE AND MEANING AND
4 COMPLEXITY TO THE WORDS THAT ARE IN THE LETTER, AND WITHOUT AN
5 FDA WITNESS TO EXPLAIN, THIS IS WHAT I MEANT BY THIS, THIS IS
6 WHAT WE WERE DOING, THIS IS THE DUTY UNDER WHICH I WAS
7 OBSERVING ALL OF THE MATTERS, THIS IS THE LIMIT OF WHAT I WAS
8 DOING, IT'S SIMPLY NOT APPROPRIATE TO OFFER THE DOCUMENT
9 WITHOUT SOMEBODY WHO CAN EXPLAIN THOSE THINGS.

10 AND IT'S BOTH A FOUNDATIONAL ELEMENT OF 803(8) -- AND IT'S
11 NOT THE RELIABILITY OF THE PIECE OF PAPER, BUT, YOU KNOW, WHAT
12 DOES THIS MEAN, AND WHAT INFERENCES ARE FAIR TO DRAW AND NOT
13 FAIR TO DRAW FROM THIS, THAT GIVES RISE TO THE 803(8)
14 OBJECTION, AS WELL AS A 403 AND 702 ISSUE.

15 SO ALL WE'RE GOING TO HAVE ON THE STAND IS AN ORRICK
16 PARALEGAL. I'M NOT GOING TO BE ABLE TO ASK THE ORRICK
17 PARALEGAL, WHAT IS THIS ANALYTE? AND DID THE FDA DO TO DO
18 THIS?

19 AND WE'VE REQUIRED A FOUNDATION FOR EVERY OTHER DOCUMENT
20 THAT COMES IN UNDER A HEARSAY EXCEPTION. I DON'T THINK THERE'S
21 SOME SPECIAL RULE FOR 803(8), AND CERTAINLY NOT THIS TYPE OF
22 803 -- THIS TYPE OF GOVERNMENT DOCUMENT.

23 SO IT'S NOT A MATTER OF, IS THIS REALLY A DOCUMENT FROM
24 THE FDA?

25 IT'S REALLY, WHAT DO THESE WORDS MEAN? WHAT DID THE FDA

10:02AM 1 DO? WHAT WAS ITS DUTY? ARE THESE FOUNDATIONAL ELEMENTS MET?

10:02AM 2 AND, UNDER 403, DOES THIS HAVE SOME DANGER OF MISLEADING
10:03AM 3 OR CONFUSING JURORS WHEN THE ONLY WITNESS IS A PARALEGAL?

10:03AM 4 THE COURT: DO YOU WANT TO RESPOND TO THE 403?

10:03AM 5 MS. WALSH: TO ALL OF IT, YOUR HONOR.

10:03AM 6 SO THERE WAS AN EXHIBIT, AT LEAST ONE, THAT CAME IN
10:03AM 7 WITHOUT A WITNESS TO LAY THE 803(8) FOUNDATION, AND THAT WAS
10:03AM 8 THE CDC REPORT REGARDING THE STEPS THAT A LAB IS SUPPOSED TO GO
10:03AM 9 THROUGH WITH AN HIV TEST. THAT CAME IN WITH A WITNESS WHO HAD
10:03AM 10 NO IDEA WHAT THE MEANING OF THE DOCUMENT WAS, AND IT CAME IN.

10:03AM 11 AND SHE COULD NOT LAY THE FOUNDATION UNDER 803(8), AND
10:03AM 12 THAT CAME INTO EVIDENCE.

10:03AM 13 I THINK THE SAME RULE SHOULD APPLY HERE.

10:03AM 14 AS TO THE 403 ARGUMENTS, ALL OF THOSE GO TO WEIGHT. WHAT
10:03AM 15 THE DOCUMENT MEANS AND WHAT ARGUMENTS THE PARTIES CAN MAKE ARE
10:03AM 16 ALL A MATTER OF WEIGHT. THEY DO NOT GO TO THE ADMISSIBILITY OF
10:03AM 17 THIS AS A PUBLIC RECORD.

10:03AM 18 THE COURT: I THINK WHAT I HEARD MR. LEACH SAY AND
10:03AM 19 WHAT RESONATES IS, WILL THE JURY BE CONFUSED BY SOME OF THE
10:04AM 20 INFORMATION THAT IS CONTAINED IN THE LETTER WHEN THEY DON'T
10:04AM 21 HAVE TESTIMONY REGARDING IT?

10:04AM 22 AND I UNDERSTAND THE PARTIES CAN ARGUE WHATEVER THE LETTER
10:04AM 23 SAYS OR DOESN'T SAY, WHETHER OR NOT THERE'S BEEN TESTIMONY
10:04AM 24 ABOUT THE SUBSTANCE OF THE LETTER.

10:04AM 25 BUT IS THERE A CONCERN THAT THE JURY MIGHT BE CONFUSED OR

10:04AM 1 CAUSE JURY CONFUSION IF THIS IS ADMITTED FOR SOMETHING OTHER
10:04AM 2 THAN NOTICE, THAT IS, THE TRUTH OF WHAT THE LETTER ASSERTS?

10:04AM 3 MS. WALSH: YEAH. AND I GUESS THAT -- I THINK
10:04AM 4 THROUGH THE COURSE OF THIS TRIAL WE HAVE HAD A LOT OF
10:04AM 5 COMPLICATED SUBJECT MATTERS THAT LOTS OF DOCUMENTS HAVE COME
10:04AM 6 IN, BOTH FROM THE GOVERNMENT AND THE DEFENSE, VALIDATION
10:04AM 7 REPORTS, PHARMACEUTICAL STUDIES, ASSAY COMPARISONS IN THE SLIDE
10:04AM 8 DECK THAT THERANOS SENT TO INVESTORS. THERE HAS BEEN A LOT OF
10:04AM 9 COMPLICATED SCIENTIFIC EVIDENCE, MUCH MORE COMPLICATED THAN
10:04AM 10 THIS.

10:04AM 11 SO I DON'T THINK, GIVEN THE NATURE OF THE EVIDENCE THAT
10:04AM 12 HAS COME IN SO FAR IN THE TRIAL, THAT THIS LETTER GIVING CLIA
10:05AM 13 WAIVER WILL BE CONFUSING.

10:05AM 14 THE COURT: OKAY. THANK YOU.

10:05AM 15 MR. LEACH.

10:05AM 16 MR. LEACH: SUBMITTED, YOUR HONOR.

10:05AM 17 THE COURT: OKAY. THANK YOU. LET'S MOVE TO 12689
10:05AM 18 AND TALK ABOUT THOSE.

10:05AM 19 I SEE THE CHART. THANK YOU FOR PUTTING THIS CHART IN YOUR
10:05AM 20 PLEADING. IT'S ON PAGE 11, ECF 12 OF YOUR MOTION.

10:05AM 21 LET'S START WITH NUMBER 1. IS THAT -- I JUST WANT TO MAKE
10:05AM 22 SURE THAT I'M READING YOUR CHART CORRECTLY. IS THAT
10:05AM 23 EXHIBIT 7098?

10:05AM 24 MS. WALSH: YES, IT IS, 7098, CORRECT.

10:05AM 25 THE COURT: OKAY.

10:05AM 1 MS. WALSH: AND 7098 IS AN EMAIL FROM IAN GIBBONS TO
10:05AM 2 SUNNY BALWANI AND ELIZABETH HOLMES ON FEBRUARY 18TH, 2010, AND
10:06AM 3 IT ATTACHES A POWERPOINT PRESENTATION.

10:06AM 4 WE ARE OFFERING ONLY PAGES WITH THE BATES NUMBERS 15025
10:06AM 5 AND 15026, WHICH ARE PART OF A LONGER PRESENTATION, BUT THOSE
10:06AM 6 ARE THE PAGES THAT WE ARE GOING TO OFFER, OR SEEK TO OFFER.

10:06AM 7 IAN GIBBONS WAS THERANOS'S CHIEF SCIENTIST IN 2010. THAT
10:06AM 8 WAS ESTABLISHED BY MR. EDLIN IN HIS TESTIMONY.

10:06AM 9 AND THE RELEVANCE OF THIS IS THAT DR. GIBBONS EXPRESSES
10:06AM 10 HIS VIEWS ABOUT THE CAPABILITY OF THERANOS TECHNOLOGY, AND THE
10:06AM 11 CAPABILITY OF THERANOS TECHNOLOGY IS AT THE CENTER OF THIS
10:06AM 12 CASE, SO IT IS HIGHLY PROBATIVE THAT THIS IS BEING SENT TO
10:06AM 13 MR. BALWANI AND IT GOES TO HIS STATE OF MIND IN AS EARLY AS
10:07AM 14 2010 AS TO WHAT HE IS BEING TOLD REGARDING THERANOS
10:07AM 15 TECHNOLOGY'S CAPABILITY.

10:07AM 16 THE COURT: SO YOU'RE SEEKING TO ADMIT THIS NOT FOR
10:07AM 17 THE TRUTH, BUT ONLY AS TO THE ISSUE OF NOTICE, AND AGAIN,
10:07AM 18 THIS -- AND LET ME REPEAT THAT COLLOQUY THAT WE HAD, NOTICE OF
10:07AM 19 THE CONTENTS OF THE EMAIL THAT MR. BALWANI RECEIVED?

10:07AM 20 MS. WALSH: THAT'S FAIR, YOUR HONOR. THE CONTENT OF
10:07AM 21 THE EMAIL AND THE ATTACHED PAGES IS HOW I WOULD REQUEST IT.

10:07AM 22 THE COURT: MR. LEACH.

10:07AM 23 MR. LEACH: YOUR HONOR, THE GOVERNMENT OBJECTS UNDER
10:07AM 24 RULE 403, AND OUR OBJECTION LIES PRIMARILY -- I THINK IT'S
10:07AM 25 MISLEADING, FIRST OF ALL, TO SUBMIT JUST TWO PAGES OF THIS

10:07AM 1 DOCUMENT. IT'S -- WHAT THIS IS IS A FEBRUARY 2010 EMAIL FROM
10:07AM 2 DR. GIBBONS ATTACHING A 111 PAGE POWERPOINT. IT'S CLEARLY A
10:08AM 3 DRAFT POWERPOINT. THIS WAS ADMITTED IN THE HOLMES TRIAL AT
10:08AM 4 EXHIBIT 7098 WHEN SHE TESTIFIED ABOUT IT.

10:08AM 5 IT'S CLEARLY A DRAFT. THERE ARE SOME BLANK SPACES IN IT.
10:08AM 6 THERE'S DISCUSSION OF SUBSTANTIAL ADDITIONAL WORK BY THERANOS
10:08AM 7 AND NUMEROUS LIMITATIONS OF ITS TECHNOLOGY AT THE TIME.

10:08AM 8 THERE'S DISCUSSION IN THE FULL POWERPOINT OF CANDIDATE
10:08AM 9 TECHNOLOGIES THAT THEY NEED TO FIND.

10:08AM 10 THERE'S NOTES FOR TBD, TO BE DETERMINED, ABOUT WHAT WE'RE
10:08AM 11 GOING TO DO ON THIS AND WHAT WE'RE GOING TO DO ON THAT.

10:08AM 12 AND IT'S IMPORTANT THAT THIS IS COMING FROM DR. GIBBONS
10:08AM 13 BECAUSE I THINK THIS HAS GREAT POTENTIAL TO MISLEAD AND CONFUSE
10:08AM 14 THE JURY ABOUT WHAT DR. GIBBONS THOUGHT.

10:08AM 15 DR. GIBBONS, THIS WAS THE SUBJECT OF SOME MOTION IN LIMINE
10:09AM 16 PRACTICE IN THE HOLMES CASE, UNFORTUNATELY PASSED AWAY IN 2013.
10:09AM 17 HIS WIDOW TOLD THE GOVERNMENT IN AN INTERVIEW THAT IN 2013
10:09AM 18 DR. GIBBONS HAD CONCERNS ABOUT THERANOS'S TECHNOLOGY AND WAS
10:09AM 19 DISTRESSED ABOUT THINGS THAT MS. HOLMES WAS SAYING.

10:09AM 20 IF -- IN 2015, THE DEFENDANT AND MS. HOLMES ARE TEXTING
10:09AM 21 BACK AND FORTH ABOUT SUSPECTING ROCHELLE GIBBONS TO BE THE
10:09AM 22 SOURCE FOR MR. CARREYROU'S ARTICLE, OR ONE OF THE SOURCES.

10:09AM 23 AND IN CONNECTION WITH THAT, MR. BALWANI AND MS. HOLMES,
10:09AM 24 THROUGH AN EMAIL BY HEATHER KING TO MR. CARREYROU, SAYS THAT
10:10AM 25 DR. GIBBONS IS NOT A TRUSTWORTHY SOURCE, A CREDIBLE FOR

10:10AM 1 THERANOS TECHNOLOGY.

10:10AM 2 AND I RAISE ALL OF THIS BECAUSE THEY'RE TRYING TO PUT TWO
10:10AM 3 PAGES OF A 111 PAGE POWERPOINT INTO EVIDENCE TO SAY,
10:10AM 4 ESSENTIALLY, I RELIED ON DR. GIBBONS, WHEN THE ENTIRE STORY IS
10:10AM 5 MUCH MORE COMPLICATED.

10:10AM 6 THE DEFENDANT'S OWN WORDS ARE, "YOU SHOULDN'T RELY ON
10:10AM 7 DR. GIBBONS."

10:10AM 8 AND FOR THOSE REASONS I THINK THIS HAS A LOT OF POTENTIAL
10:10AM 9 TO MISLEAD AND CONFUSE THE JURY.

10:10AM 10 AND AT A MINIMUM, IF THIS COMES IN, THE ENTIRE DOCUMENT
10:10AM 11 NEEDS TO COME IN, BECAUSE I THINK IF YOU LOOK AT THE ENTIRE
10:10AM 12 DOCUMENT, IT'S CLEARLY A DRAFT, IT'S CLEARLY A WORK IN
10:10AM 13 PROGRESS, IT'S CLEARLY AN EARLY ITERATION, AND THERE'S ANOTHER
10:10AM 14 SIDE TO THIS STORY THAT IS NOT BELIED BY THESE SINGLE THREE
10:10AM 15 PAGES OF A DOCUMENT.

10:10AM 16 THE COURT: I HEAR MR. LEACH SUGGESTING, UNDER 106,
10:11AM 17 THE ENTIRETY OF THE DOCUMENT SHOULD COME IN, OR CERTAIN
10:11AM 18 PORTIONS SHOULD COME IN SHOULD THE GOVERNMENT DECIDE TO PUT
10:11AM 19 ADDITIONAL PORTIONS IN.

10:11AM 20 MS. WALSH: SURE. AND IF THERE ARE 106 ADDITIONS,
10:11AM 21 WE'RE FINE WITH THAT.

10:11AM 22 THE COURT: AND AGAIN, IT COMES IN -- YOU'RE SEEKING
10:11AM 23 IT ONLY IN FOR NOTICE OF RECEIPT OF THIS INFORMATION?

10:11AM 24 MS. WALSH: CORRECT.

10:11AM 25 THE COURT: NOT FOR THE TRUTH OF THE MATTER

10:11AM 1 ASSERTED?

10:11AM 2 MS. WALSH: THAT'S CORRECT, YOUR HONOR.

10:11AM 3 THE COURT: AND, MR. LEACH, IF THE GOVERNMENT -- IF
10:11AM 4 THE COURT ALLOWS THIS TO COME IN, THE GOVERNMENT, UNDER 106,
10:11AM 5 WOULD BE PERMITTED TO PUT IN EITHER THE ENTIRETY OF THE
10:11AM 6 DOCUMENT, WHICH WOULD ALLOW YOU BOTH TO ARGUE IT, WHATEVER IT
10:11AM 7 IS, IF IT'S A DRAFT OR WHATEVER.

10:11AM 8 YOU WOULDN'T BE -- IT DOESN'T SOUND LIKE YOU WOULD BE
10:11AM 9 PRECLUDED, IN A REBUTTAL CASE, FOR PUTTING IN THE OTHER
10:11AM 10 INFORMATION THAT YOU TALKED ABOUT IF THAT'S WHAT YOU SEEK TO
10:11AM 11 DO.

10:12AM 12 MR. LEACH: WELL, I THINK IT WOULD BE APPROPRIATE TO
10:12AM 13 DO ON CROSS-EXAMINATION, YOUR HONOR. I'M TRYING TO SPARE ALL
10:12AM 14 OF US THAT STORY FOR THE VERY LIMITED PROBATIVE VALUE OF
10:12AM 15 MR. BALWANI RECEIVED THIS EMAIL IN FEBRUARY OF 2010.

10:12AM 16 THERE'S NO EVIDENCE THAT HE READ IT. THERE'S NO EVIDENCE
10:12AM 17 THAT HE FORWARDED IT.

10:12AM 18 THE COURT: SURE.

10:12AM 19 MR. LEACH: THERE'S NO EVIDENCE THAT HE FOCUSSED ON
10:12AM 20 THESE TWO PAGES AS OPPOSED TO SOMETHING ELSE.

10:12AM 21 I GRANT YOU THIS PASSED THROUGH HIS IN BOX, AND THERE'S AN
10:12AM 22 ARGUMENT THAT IT HAS SOME PROBATIVE VALUE.

10:12AM 23 BUT THE WHOLE STORY IS, I THINK, AN INCREDIBLY WEAK
10:12AM 24 INFERENCE THAT MR. BALWANI RELIED ON THIS SINGLE POWERPOINT
10:12AM 25 FROM FEBRUARY OF 2010, AND IT HAS THE RISK OF CONFUSING THE

10:12AM 1 JURY ABOUT HOW MUCH MR. BALWANI REALLY PUT FAITH IN WHAT
10:12AM 2 DR. GIBBONS HAD TO SAY.

10:12AM 3 THE COURT: OKAY. ANYTHING FURTHER ON THIS THEN?

10:13AM 4 MS. WALSH: YOUR HONOR, JUST ON THE ISSUE OF WHAT
10:13AM 5 DR. GIBBONS'S WIDOW TOLD THE GOVERNMENT. SHE WASN'T A WITNESS
10:13AM 6 IN THIS CASE. THERE WAS NO EVIDENCE ABOUT WHAT SHE EITHER SAID
10:13AM 7 OR TOLD MR. BALWANI.

10:13AM 8 THIS IS COMING IN FOR NOTICE TO MR. BALWANI, SO ANY
10:13AM 9 CROSS-EXAMINATION HAS TO BE TETHERED TO SOMETHING THAT
10:13AM 10 POTENTIALLY UNDERMINES NOTICE TO HIM, NOT JUST KICKING UP DUST
10:13AM 11 ABOUT DR. GIBBON'S WIDOW BEING UNHAPPY WITH THERANOS FOR
10:13AM 12 WHATEVER REASONS.

10:13AM 13 AS TO THERE'S A LOT MORE TO THE STORY AND THIS IS ONLY A
10:13AM 14 DRAFT, AGAIN, THOSE ARGUMENTS GO TO THE WEIGHT OF THE DOCUMENT,
10:13AM 15 NOT TO ITS ADMISSIBILITY.

10:13AM 16 THE COURT: WELL, I DIDN'T HEAR MR. LEACH SAYING
10:13AM 17 THAT HE INTENDS TO CALL SOMEBODY TO TESTIFY ABOUT THE WIDOW. I
10:13AM 18 THINK THIS WAS JUST CONTEXT FOR THE DISCUSSION.

10:13AM 19 IS THAT RIGHT, MR. LEACH?

10:13AM 20 MR. LEACH: I, I DON'T INTEND TO CALL MS. GIBBONS,
10:14AM 21 BUT I DO INTEND TO CROSS-EXAMINE WHOEVER IS ON THE STAND WITH
10:14AM 22 APPROPRIATE DOCUMENTS THAT I THINK ARE ADMISSIBLE ON THEIR OWN
10:14AM 23 THAT WILL REFER TO DR. GIBBONS'S PASSING, AND WE'LL REFER TO
10:14AM 24 THE FACT THAT ROCHELLE WAS HIS WIDOW.

10:14AM 25 I MAY RECALL SOME OF THE TEXTS WHERE MR. BALWANI IS

10:14AM 1 EXPRESSING ANGST ABOUT HER BEING A SOURCE FOR CARREYROU, AND I
10:14AM 2 WOULD DO IT THROUGH ADMISSIBLE EVIDENCE.

10:14AM 3 THE COURT: OKAY.

10:14AM 4 MR. LEACH: BUT I THINK THE BASIC POINT IS
10:14AM 5 MR. BALWANI -- DR. GIBBON'S VIEWS ABOUT THERANOS TECHNOLOGY
10:14AM 6 CHANGED, AND IF THEY'RE GOING TO ARGUE THAT HE RELIED ON
10:14AM 7 DR. GIBBONS, I SHOULD BE ENTITLED TO SHOW AT A DIFFERENT POINT
10:14AM 8 IN TIME HE DID NOT RELY ON DR. GIBBONS.

10:14AM 9 THE COURT: OKAY.

10:14AM 10 MS. WALSH: IF THAT WAS SHOWN TO MR. BALWANI. THIS
10:14AM 11 GOES TO MR. BALWANI'S STATE OF MIND IN 2010.

10:14AM 12 THE COURT: RIGHT. OKAY. SO THIS IS ONLY FOR
10:15AM 13 NOTICE AND NOT FOR THE TRUTH OF THE MATTER ASSERTED, THERE'S A
10:15AM 14 403 OBJECTION ON THAT, AND/OR YOU HAVE, THE DEFENSE HAS NO
10:15AM 15 OBJECTION FOR THE ENTIRETY OF THE DOCUMENT TO COME IN, OR
10:15AM 16 PORTIONS OF IT IF OFFERED BY THE GOVERNMENT.

10:15AM 17 MS. WALSH: YES, YOUR HONOR.

10:15AM 18 THE COURT: OKAY. ALL RIGHT. THANK YOU.

10:15AM 19 LET'S MOVE TO NUMBER 2. THIS IS 15004, EMAILS TO
10:15AM 20 MR. BALWANI REGARDING THERANOS TECHNOLOGY CAPABILITIES.

10:15AM 21 IS THERE A STIPULATION ON THIS?

10:15AM 22 MR. LEACH: NO, YOUR HONOR.

10:15AM 23 THIS IS, THIS IS AN EMAIL FROM DR. GIBBONS -- THERE IS AN
10:15AM 24 AGREEMENT THAT THE EMAIL IS AUTHENTIC.

10:15AM 25 THE COURT: I SEE.

10:15AM 1 MR. LEACH: THE GOVERNMENT HAS A 403 OBJECTION
10:15AM 2 SIMILAR TO THE ONE WITH RESPECT TO EXHIBIT 1 THAT WE JUST
10:15AM 3 REVIEWED.

10:15AM 4 THIS IS AN EMAIL FROM DR. GIBBONS TO MS. HOLMES AND
10:16AM 5 SUREKHA GANGADKHEDKAR WITH A COPY TO MR. BALWANI.

10:16AM 6 AND OUR CONCERNS HERE ARE SIMILAR. DR. GIBBONS HAS PASSED
10:16AM 7 AWAY, WE CAN'T EXAMINE HIM ABOUT WHAT HE MEANT IN THIS, WHETHER
10:16AM 8 OR NOT THESE ARE ARGUMENTS THAT HE WANTS TO PUT FORTH OR
10:16AM 9 GENUINE CONCLUSIONS THAT HE HAD REACHED ABOUT THE TECHNOLOGY.

10:16AM 10 AND THERE'S EVERY REASON TO THINK THAT MR. BALWANI DID NOT
10:16AM 11 PUT WEIGHT ON THESE STATEMENTS AT A LATER POINT IN TIME.

10:16AM 12 SO FOR ALL OF THE REASONS THAT WE OBJECTED TO EXHIBIT 1,
10:16AM 13 WE HAVE A SIMILAR OBJECTION TO EXHIBIT 2.

10:16AM 14 THE COURT: OKAY. THANK YOU.

10:16AM 15 MS. WALSH.

10:16AM 16 MS. WALSH: YES, THANK YOU, YOUR HONOR.

10:16AM 17 SO ALL OF THOSE ARGUMENT AGAIN GO TO THE WEIGHT OF THIS
10:16AM 18 DOCUMENT. THIS DOCUMENT WE ARE OFFERING FOR NOTICE TO
10:16AM 19 MR. BALWANI AS TO WHAT DR. GIBBONS WAS SAYING ABOUT THERANOS
10:16AM 20 TECHNOLOGY IN 2010.

10:16AM 21 AND SPECIFICALLY THE RELEVANCE IS REALLY TWO-FOLD, IT'S
10:17AM 22 ABOUT THE CAPABILITIES OF THERANOS TECHNOLOGY, BUT IT'S ALSO
10:17AM 23 RELATING TO A PRESENTATION TO GSK, WHICH IS ONE OF THE PHARMA
10:17AM 24 COMPANIES.

10:17AM 25 AND DR. GIBBONS IS TALKING ABOUT, I THINK WE HAVE

10:17AM 1 DEMONSTRATED CAPABILITIES FULLY EQUIVALENT TO LAB METHODS IN
10:17AM 2 AREAS WHERE WE HAVE DONE ASSAY DEVELOPMENT, AND HE GOES ON TO
10:17AM 3 SAY POSITIVE THINGS ABOUT THE THERANOS TECHNOLOGY IN THE
10:17AM 4 CONTEXT OF CREATING A SLIDE DECK FOR GSK.

10:17AM 5 THE GOVERNMENT, THROUGH THIS TRIAL, HAS PRESENTED EVIDENCE
10:17AM 6 THAT MS. HOLMES AND MR. BALWANI FALSELY REPRESENTED TO
10:17AM 7 INVESTORS THAT PHARMA COMPANIES VALIDATED THERANOS TECHNOLOGY,
10:17AM 8 AND THEY PRESENTED WITNESSES ON THAT ISSUE, A WITNESS FROM
10:17AM 9 SCHERING-PLOUGH, AND A WITNESS FROM PFIZER.

10:17AM 10 THEY DID NOT CALL A WITNESS FROM GSK.

10:17AM 11 AND THIS DOCUMENT TENDS TO REBUT THAT ASSERTION AT LEAST
10:18AM 12 AS FAR AS MR. BALWANI UNDERSTOOD IN 2010.

10:18AM 13 THE COURT: THE SUBJECT MATTER ON THESE EMAILS IS
10:18AM 14 ALL GSK, I BELIEVE?

10:18AM 15 MS. WALSH: YES.

10:18AM 16 THE COURT: MR. LEACH.

10:18AM 17 MR. LEACH: ASSUMING HE READ IT, ASSUMING HE PUT ANY
10:18AM 18 WEIGHT ON IT, ASSUMING THAT SOMETHING DIDN'T HAPPEN AFTER THE
10:18AM 19 FACT.

10:18AM 20 THERE ARE -- I CONCEDE THERE IS A LITTLE BIT OF PROBATIVE
10:18AM 21 VALUE TO THIS, BUT WITHOUT DR. GIBBONS EXPLAINING THE WHOLE
10:18AM 22 CONTEXT THAT I'VE DESCRIBED, THAT MR. GIBBONS BY 2013 HAD GRAVE
10:18AM 23 CONCERNS ABOUT THE TECHNOLOGY, AND MR. BALWANI, ALONG WITH
10:19AM 24 HEATHER KING AND ELIZABETH HOLMES, SAID HE'S NOT A CREDIBLE
10:19AM 25 SOURCE OF THE STATE OF THERANOS'S TECHNOLOGY, IT HAS GREAT

10:19AM 1 POTENTIAL TO MISLEAD AND CONFUSE THE JURY, AND OUR ARGUMENTS
10:19AM 2 ARE ESSENTIALLY 403.

10:19AM 3 THE COURT: OKAY.

10:19AM 4 MR. LEACH: MAY I ADD, YOUR HONOR, IF THE COURT
10:19AM 5 OVERRULES THE OBJECTION AND PROVIDES SOME TYPE OF LIMITING
10:19AM 6 INSTRUCTION, I WOULD URGE THE COURT, LIKE THE OTHER ONES, TO
10:19AM 7 LIMIT IT TO THE MATTERS SET FORTH IN THE EMAIL OR REGARDING THE
10:19AM 8 SUBJECT GSK.

10:19AM 9 I THINK THE PARTIES HAVE SIGNIFICANT DISAGREEMENTS OVER
10:19AM 10 THE IMPORT OF THIS AND WHAT EXACTLY IS BEING SAID TO
10:19AM 11 MR. BALWANI HERE.

10:19AM 12 THE COURT: WELL, THANK YOU.

10:19AM 13 AND THAT'S AN ISSUE WHEN EMAILS, OTHER ITEMS, ARE
10:19AM 14 INTRODUCED NOT FOR THE TRUTH OF THE MATTER ASSERTED, BUT MERELY
10:19AM 15 FOR NOTICE.

10:19AM 16 WHAT THAT REALLY DOES IS IT ALLOWS THE PARTIES TO ARGUE
10:20AM 17 JUST WHAT INFERENCES ARE APPROPRIATE OR NOT APPROPRIATE TO BE
10:20AM 18 DRAWN FROM THE DOCUMENT, THE EMAIL, WHATEVER IT IS, BECAUSE
10:20AM 19 IT'S NOT OFFERED FOR THE TRUTH OF WHAT IS SAID IN THERE AND THE
10:20AM 20 PARTIES ARE, IN THOSE CIRCUMSTANCES, PERMITTED TO ARGUE THEIR
10:20AM 21 OPINIONS, AND THE JURY'S JOB IS TO LISTEN AND MAKE DECISIONS
10:20AM 22 BASED ON THE ARGUMENTS, THE EVIDENCE, AND THE INSTRUCTIONS.

10:20AM 23 MS. WALSH: RIGHT.

10:20AM 24 THE COURT: OKAY. ALL RIGHT. THANK YOU.

10:20AM 25 LET'S GO TO THE NEXT ONE. I BELIEVE NEXT IS 6.

10:20AM 1 MS. WALSH: YES.

10:20AM 2 THE COURT: MS. WALSH, WHAT ABOUT 6?

10:20AM 3 MS. WALSH: SO 6 IS THE FDA'S 510(K) APPROVAL OF
10:20AM 4 THAT SAME ASSAY WE WERE TALKING ABOUT IN CONNECTION WITH THE
10:20AM 5 CLIA WAIVER.

10:20AM 6 THE COURT: 6 IS LONG YOU WERE GOING TO SAY, RIGHT?

10:20AM 7 MS. WALSH: I WAS GOING TO SAY THAT, YES, IT IS
10:20AM 8 LONG.

10:21AM 9 AND THE FIRST PAGE OF THE EXHIBIT IS A SCREENSHOT OF WHAT
10:21AM 10 EXISTS ON THE FDA WEBSITE TODAY, AND THE PARALEGAL WILL BE ABLE
10:21AM 11 TO TESTIFY THAT HE WENT TO THE WEBSITE, HE -- THIS IS WHAT HE
10:21AM 12 SAW. HE FOUND THE 510(K) CLEARANCE AND HE PULLED IT UP.

10:21AM 13 AND THEN THE CLEARANCE ITSELF IS BEHIND THAT SCREENSHOT.

10:21AM 14 THE COURT: IS THERE A -- DO YOU NEED -- OH, I SEE
10:21AM 15 ON THE BOTTOM, I THINK IT'S MAY 18TH, 2022. IS THAT THE TIME
10:21AM 16 STAMP FOR THE SCREENSHOT?

10:21AM 17 MS. WALSH: CORRECT, YES.

10:21AM 18 THE COURT: OKAY. THANK YOU.

10:21AM 19 AND THEN THE ENTIRETY OF THIS DOCUMENT IS WHAT YOU SEEK?

10:21AM 20 MS. WALSH: WE DO, YOUR HONOR, ALTHOUGH IF THE COURT
10:21AM 21 HAS CONCERN WITH IT, WE HAVE SOME PAGES THAT WE WANT TO
10:22AM 22 HIGHLIGHT.

10:22AM 23 AND IF WE -- IF THE COURT WAS CONCERNED ABOUT THE LENGTH,
10:22AM 24 WE COULD OFFER THE EXHIBIT, SO THE DOCKET FILING PAGE 94 TO
10:22AM 25 103, AND THAT'S MAYBE FIVE -- I GUESS A LITTLE MORE THAN FIVE

10:22AM 1 PAGES.

10:22AM 2 THE COURT: WELL, THANK YOU. I LOOK AT -- IT'S A
10:22AM 3 LONG DOCUMENT. IT HAS A LOT OF CALCULATIONS, INSTRUCTIONS,
10:22AM 4 OTHER INFORMATION THAT IS INCLUDING 510(K), EQUIVALENCY
10:22AM 5 DETERMINATIONS AND THOSE TYPES OF THINGS, AND THAT WAS MY FIRST
10:22AM 6 PASS AT THIS, WAS THIS -- WHAT IS THIS FOR?

10:23AM 7 I THINK YOU'RE SAYING THIS IS NOTICE ALSO?

10:23AM 8 MS. WALSH: ACTUALLY, WE ARE OFFERING THIS UNDER
10:23AM 9 803(8).

10:23AM 10 THE COURT: OKAY.

10:23AM 11 MS. WALSH: IT'S THE FDA APPROVAL OR CLEARANCE, I
10:23AM 12 GUESS, OF THE DEVICE.

10:23AM 13 THE COURT: SURE.

10:23AM 14 MS. WALSH: AND THE SPECIFIC PAGES WE WOULD WANT IS
10:23AM 15 PAGE 1, WHICH IS THE SCREENSHOT -- ACTUALLY I'M GOING TO
10:23AM 16 CONFUSE THE RECORD. I'M GOING TO USE THE DOCKET PAGES.

10:23AM 17 SO PAGE 94 ON THE TOP OF THE DOCUMENT, 95, 96 THROUGH 97
10:23AM 18 IS THE LETTER ITSELF, 98 THROUGH 103 IS SOME DESCRIPTIONS OF
10:23AM 19 THE DEVICE AND DESCRIPTIONS OF THE PRECISION STUDY RESULTS, AND
10:23AM 20 I THINK THOSE ARE RELEVANT BASED ON OTHER EVIDENCE IN THE CASE,
10:24AM 21 SO WE WOULD WANT THOSE.

10:24AM 22 THE COURT: ENDING AT PAGE 103?

10:24AM 23 MS. WALSH: THROUGH PAGE 103.

10:24AM 24 THE COURT: OKAY.

10:24AM 25 MR. LEACH.

10:24AM 1 MR. LEACH: WE OBJECT, YOUR HONOR, UNDER RULE 104,
10:24AM 2 403, AND 801.

10:24AM 3 THIS IS A 54 PAGE EXHIBIT. IT INCLUDES PRINTOUTS FROM THE
10:24AM 4 FDA'S WEBSITE, AND A LETTER FROM THE FDA TO SOMEONE NAMED
10:24AM 5 BRAD ARINGTON AT THERANOS.

10:24AM 6 THE LETTER ITSELF MAKES VERY SPECIFIC FACTUAL ASSERTIONS
10:24AM 7 WHICH ARE BEING OFFERED FOR THE TRUTH.

10:24AM 8 THE LETTER ALSO ATTACHES WHAT IS CALLED A FORM 3881, WHICH
10:24AM 9 IS AN APPLICATION BY THERANOS, SO THOSE ARE STATEMENTS BY
10:25AM 10 THERANOS, NOT MERELY THE FDA.

10:25AM 11 THE DOCUMENT IS HEARSAY. IT COMPRISES OUT OF COURT
10:25AM 12 STATEMENTS BY THERANOS AND THE FDA. THERE'S NO FOUNDATION FOR
10:25AM 13 RULE 803(8), THE PUBLIC RECORDS EXCEPTION.

10:25AM 14 THIS IS SIGNIFICANTLY MORE COMPLICATED THAN THE ONE PAGE
10:25AM 15 DOCUMENT THAT WE LOOKED AT ON THE CLIA WAIVER IN EXHIBIT 7.

10:25AM 16 AND THERE'S NO EVIDENCE THAT MR. BALWANI REVIEWED THIS.
10:25AM 17 YOU KNOW, THERE'S NO COVER EMAIL THAT SAYS THAT HE GOT THIS.

10:25AM 18 THIS IS SIMPLY A PRINTOUT FROM THE FDA'S WEBSITE.

10:25AM 19 SO PRIMARILY FOR HEARSAY AND 403 GROUNDS, WE OBJECT.

10:25AM 20 THE COURT: THANK YOU.

10:25AM 21 WHAT IS THE CONNECTION THEN TO MR. BALWANI, OR DOES THERE
10:25AM 22 NEED TO BE ONE IN YOUR OPINION, MS. WALSH?

10:25AM 23 MS. WALSH: I DON'T THINK THERE NEEDS TO BE ONE.

10:25AM 24 WELL, I GUESS THERE IS A CONNECTION ALREADY IN EVIDENCE
10:26AM 25 WHICH CAME IN THROUGH MR. EDLIN WHO TESTIFIED ABOUT THE ALL

10:26AM 1 HANDS MEETING AT THERANOS WHEN THE FDA APPROVED -- WHEN THE FDA
10:26AM 2 CLEARANCE WAS ANNOUNCED TO ALL OF THE EMPLOYEES AND A SLIDE
10:26AM 3 DECK WAS USED TO -- AND THAT CAME INTO EVIDENCE -- TO EXPLAIN
10:26AM 4 THE FDA CLEARANCE.

10:26AM 5 THIS IS THE DOCUMENT ITSELF, AND I THINK IT IS SELF
10:26AM 6 AUTHENTICATING. I THINK IT IS A PUBLIC RECORD THAT SHOULD COME
10:26AM 7 IN UNDER ANY HEARSAY OBJECTION.

10:26AM 8 I DON'T THINK IT'S REALLY IN DISPUTE THAT THERANOS GOT
10:26AM 9 THIS ASSAY APPROVED, SO I'M NOT SURE WHY AT LEAST PART OF THIS
10:26AM 10 DOCUMENT SHOULDN'T COME IN.

10:26AM 11 THE COURT: AND YOU'RE NOT ASKING FOR ANY REDACTIONS
10:26AM 12 TO THE LETTER, PAGE 96? YOU'RE NOT ASKING THAT ANY OF THE
10:26AM 13 CONTENT BE CHANGED?

10:27AM 14 MS. WALSH: NO.

10:27AM 15 THE COURT: YOU'RE NOT ASKING THAT THE LAST SENTENCE
10:27AM 16 IN THE FIRST FULL PARAGRAPH BE STRICKEN, NOR THE FIRST SENTENCE
10:27AM 17 IN THE THIRD FULL PARAGRAPH, NONE OF THAT?

10:27AM 18 MS. WALSH: WE WERE GOING TO OFFER IT AS IT EXISTS
10:27AM 19 ON THE WEBSITE. BUT IF --

10:27AM 20 THE COURT: NO, I'M JUST ASKING THAT, WHETHER ANY
10:27AM 21 REDACTIONS WERE GOING TO BE REQUESTED.

10:27AM 22 MR. LEACH.

10:27AM 23 MR. LEACH: YOUR HONOR, NONE OF THIS SHOULD COME IN.
10:27AM 24 THESE ARE ALL FACTUAL ASSERTIONS BY THE FDA, AND THERE'S NO
10:27AM 25 HEARSAY EXCEPTION. IT'S SAYING WE'VE REVIEWED YOUR SECTION

10:27AM 1 510(K) PREMARKED NOTIFICATION.

10:27AM 2 THERE'S ALSO NO CONTEXT FOR WHAT ANY OF THESE WORDS MEAN
10:27AM 3 OR TOOLS TO GIVE THE JURY TO UNDERSTAND THIS. IT'S, IT'S
10:27AM 4 HEARSAY, IT'S CONFUSING, IT'S -- BASED ON MS. WALSH'S ARGUMENT,
10:27AM 5 IT'S CUMULATIVE OF WHAT MR. EDLIN HAS ALREADY TESTIFIED TO.

10:28AM 6 I JUST DON'T SEE A NEED FOR THIS TO COME IN, AND AS WE
10:28AM 7 SAID BEFORE, THEY SHOULD HAVE A WITNESS FROM THE FDA TO LAY THE
10:28AM 8 FOUNDATION FOR THE PUBLIC RECORDS EXCEPTION.

10:28AM 9 THE COURT: OKAY. THANK YOU.

10:28AM 10 LET'S GO TO NUMBER 8, PLEASE.

10:28AM 11 THIS IS, MS. WALSH, NOT OFFERED FOR THE TRUTH OF THE
10:28AM 12 MATTER ASSERTED?

10:28AM 13 MS. WALSH: CORRECT, IT IS NOT OFFERED FOR THE
10:28AM 14 TRUTH.

10:28AM 15 IT IS OFFERED FOR THE FACT OF THE DISCLOSURE BY THERANOS
10:28AM 16 TO THE FDA OF ITS USE OF MODIFIED COMMERCIAL DEVICES.

10:29AM 17 THE COURT: MR. LEACH.

10:29AM 18 MR. LEACH: I THINK THIS IS BEING OFFERED FOR THE
10:29AM 19 TRUTH, YOUR HONOR, AND WE OBJECT UNDER RULE 104, 401, 403, AND
10:29AM 20 801.

10:29AM 21 THIS IS AN EMAIL FROM ELIZABETH HOLMES, WHO WILL NOT BE
10:29AM 22 TESTIFYING IN THIS CASE, TO INDIVIDUALS AT THE FOOD AND DRUG
10:29AM 23 ADMINISTRATION.

10:29AM 24 IT SETS OUT VARIOUS FACTUAL MATTERS IN THE SUBSTANCE OF
10:29AM 25 THE EMAIL, "THERANOS DID THIS, THERANOS DID THAT."

1 IT ALSO ATTACHES LISTS OF ASSAYS THAT THERANOS CLAIMS IT
2 WAS USING IN ITS LAB AND INTENDED TO USE IN ITS LAB.

3 MS. WALSH SEEMS TO BE SAYING THAT WE DON'T CARE WHETHER
4 THE THINGS IN THE EMAIL WERE TRUE OR FALSE, WE JUST WANT THIS
5 IN AS EVIDENCE OF WHAT MS. HOLMES TOLD THE FDA.

6 I THINK THAT IS A HEARSAY PURPOSE, BUT IT'S ALSO
7 IRRELEVANT.

8 THE ARGUMENT SEEMS TO BE THAT BECAUSE MS. HOLMES WAS
9 CANDID, ALLEGEDLY, ON ONE OCCASION WITH FDA OFFICIALS, THE
10 INFERENCE THAT THEY WANT TO DRAW IS THAT MR. BALWANI WAS CANDID
11 WITH INVESTORS AND WITH PATIENTS IN OTHER CIRCUMSTANCES. THE
12 FACT THAT THEY TOLD THE GOVERNMENT THIS MEANS THAT THEY
13 COULDN'T HAVE LIED TO INVESTORS.

14 THAT'S AKIN TO 404(B) EVIDENCE. IT'S ESSENTIALLY
15 CHARACTER EVIDENCE. I DON'T SEE THE RELEVANCE OF THAT.

16 MS. HOLMES CAN'T BE CROSS-EXAMINED ON THIS. IT SHOULDN'T
17 COME IN. IT'S BEING OFFERED FOR THE TRUTH.

18 MS. WALSH: SO, YOUR HONOR, WE DO -- WE ARE NOT
19 OFFERING THIS FOR ITS TRUTH. IT IS THE FACT THAT THERANOS GAVE
20 NOTICE TO THE FDA THAT IT WAS USING THESE MODIFIED COMMERCIAL
21 DEVICES.

22 AND THROUGHOUT THE TRIAL, THE GOVERNMENT HAS ARGUED THAT
23 THE USE OF MODIFIED COMMERCIAL DEVICES WAS A SUPER STATE SECRET
24 THAT -- WHERE MR. BALWANI AND MS. HOLMES DID NOT TELL ANYONE,
25 AND THE SECRECY WAS PART OF THE SCHEME TO DEFRAUD.

1 MR. GROSSMAN TESTIFIED THAT HE WAS NEVER TOLD THAT
2 THERANOS USED MODIFIED COMMERCIAL MACHINES.

3 DR. PANDORI REFERRED TO THE MODIFIED MACHINES AS HACKED,
4 INDICATING THAT THERE WAS SOMETHING SINISTER OR IMPROPER ABOUT
5 IT.

6 DR. ROSENDORFF TESTIFIED THAT THE USE OF THOSE MACHINES
7 WAS SUBJECT TO STRICT SECRECY.

8 AND THE GOVERNMENT'S THEORY IS THAT SECRECY WAS A MEANS TO
9 DEFRAUD INVESTORS.

10 THIS SHOWS THAT THE SECRECY WAS NOT A MEANS -- OR IT TENDS
11 TO SHOW. IT'S AN ARGUMENT.

12 THE SECRECY WAS NOT TO DEFRAUD INVESTORS. IT WAS TO
13 PROTECT VALUABLE IP.

14 AND HOW DOES ONE GO ABOUT DOING THAT? IT FILES PATENTS,
15 AND IT DISCLOSES WHAT IS BEING USED TO A REGULATOR.

16 SO I THINK THE FACT OF THE DISCLOSURE TENDS TO REBUT THE
17 GOVERNMENT'S THEORY REGARDING SECRECY.

18 THE COURT: IS THERE ANY CONCERN THAT MR. BALWANI'S
19 NAME IS NOT ATTACHED TO ANY OF THESE?

20 MS. WALSH: WELL, YOUR HONOR --

21 THE COURT: HE'S NOT A SENDER.

22 MS. WALSH: HE'S NOT A SENDER, BUT HE IS CHARGED IN
23 A CONSPIRACY AND A SCHEME TO DEFRAUD WHERE THERE'S GOING TO BE
24 CO-SCHEMER LIABILITY THAT IS CHARGED TO THE JURY.

25 THE GOVERNMENT HAS BEEN ARGUING THROUGHOUT THE TRIAL, AND

10:32AM 1 I EXPECT IN CLOSING WILL ARGUE, THAT WHATEVER MS. HOLMES DID,
10:32AM 2 MR. BALWANI KNEW ALL ABOUT IT.

10:32AM 3 SO I DON'T THINK THAT HE HAS TO BE ON THE EMAIL FOR THIS
10:32AM 4 EMAIL TO BE RELEVANT.

10:32AM 5 THE COURT: MR. LEACH.

10:32AM 6 MR. LEACH: AGAIN, YOUR HONOR, THAT ALL GOES TO THE
10:32AM 7 TRUTH.

10:32AM 8 I THINK IT'S CRITICAL THAT MR. BALWANI IS NOT ON THIS.
10:32AM 9 THERE'S NO EVIDENCE THAT HE RECEIVED THIS. THERE'S NO EVIDENCE
10:33AM 10 THAT HE KNEW THAT MS. HOLMES WAS DOING THIS.

10:33AM 11 AND THEY'RE OFFERING IT FOR THE TRUTH THAT MS. HOLMES MADE
10:33AM 12 THESE STATEMENTS TO THE FDA AND, THEREFORE, MS. HOLMES LACKED
10:33AM 13 THE INTENT TO HIDE THIS FROM INVESTORS AND PATIENTS, ALTHOUGH
10:33AM 14 THERE'S A HOST OF REASONS WHY YOU MIGHT TELL THE FDA SOMETHING,
10:33AM 15 BUT NOT YOUR INVESTORS.

10:33AM 16 AND I THINK THIS IS A CLASSIC HEARSAY PURPOSE AND 403
10:33AM 17 SHOULD EXCLUDE IT AS WELL.

10:33AM 18 MS. WALSH: MAY I SAY ONE MORE THING?

10:33AM 19 THE COURT: SURE.

10:33AM 20 MS. WALSH: THE GOVERNMENT OFFERED THE PARLOFF
10:33AM 21 ARTICLE WHICH WAS CHOCK FULL OF STATEMENTS BY MS. HOLMES NOT
10:33AM 22 FOR THE TRUTH, BUT THE FACT THAT SHE WAS SAYING THIS TO THE
10:33AM 23 WORLD.

10:33AM 24 I THINK THIS IS THE SAME -- IT'S THE SAME BASIS FOR
10:33AM 25 ADMISSION HERE. IT'S THE FACT THAT MS. HOLMES IS SAYING THIS

10:33AM 1 TO THE FDA THAT IS RELEVANT.

10:33AM 2 AND WHY IS IT RELEVANT? BECAUSE IT SHOWS, OR TENDS TO
10:33AM 3 SHOW, THAT THE GOVERNMENT'S THEORY ABOUT SECRECY BEING A MEANS
10:33AM 4 OF DEFRAUDING INVESTORS MAY NOT BE 100 PERCENT TRUE. THERE MAY
10:34AM 5 BE ANOTHER EXPLANATION.

10:34AM 6 THE COURT: SO I THINK WE UNDERSTAND IN A
10:34AM 7 PROSECUTION, THE GOVERNMENT CAN ARGUE, IN A CONSPIRACY
10:34AM 8 PROSECUTION. STATEMENTS, CONDUCT ATTRIBUTABLE TO A
10:34AM 9 COCONSPIRATOR. I THINK THAT'S WHAT YOU'RE TALKING ABOUT.

10:34AM 10 IS THAT RIGHT?

10:34AM 11 MS. WALSH: YES.

10:34AM 12 THE COURT: AND THE GOVERNMENT CAN DO THAT.

10:34AM 13 ARE YOU SAYING THAT THE DEFENSE SHOULD BE ABLE TO
10:34AM 14 INTRODUCE OTHER TESTIMONY OR ITEMS UNDER THE SAME THEORY IN
10:34AM 15 THEIR CASE-IN-CHIEF?

10:34AM 16 MS. WALSH: I'M NOT SAYING THAT THE RULES OF
10:34AM 17 EVIDENCE PERMIT THAT.

10:34AM 18 BUT I THINK AN ARGUMENT COULD BE FORMULATED THAT HERE IS
10:34AM 19 AN EMAIL FROM THE CEO OF THE COMPANY, AND THE CEO WAS ON THE
10:34AM 20 SAME PAGE ABOUT MAKING THESE DISCLOSURES TO THE FDA.

10:34AM 21 THE COURT: OKAY.

10:34AM 22 MR. LEACH.

10:35AM 23 MR. LEACH: IF THAT WERE TRUE, YOUR HONOR, EVERY
10:35AM 24 EMAIL THAT ELIZABETH HOLMES SENT EXPRESSING HONESTY OR HOPE
10:35AM 25 OR -- WOULD BE ADMISSIBLE UNDER THAT THEORY.

10:35AM 1 THEY'RE OFFERING IT FOR THE TRUTH THAT MS. HOLMES MADE
10:35AM 2 THESE STATEMENTS. SHE'S UNAVAILABLE FOR CROSS-EXAMINATION IN
10:35AM 3 THIS PROCEEDING.

10:35AM 4 THE INFERENCES THAT THEY WANT TO DRAW FROM IT ARE WEAK AND
10:35AM 5 ALONG THE LINES OF CHARACTER EVIDENCE.

10:35AM 6 AND THIS IS DIFFERENT FROM THE PARLOFF ARTICLE. THE
10:35AM 7 PARLOFF ARTICLE WAS READ AND CONSIDERED BY INVESTORS. THAT WAS
10:35AM 8 THE PURPOSE FOR WHICH WE ADMITTED IT.

10:35AM 9 SO FOR ALL OF THOSE REASONS, WE THINK YOU THIS SHOULD NOT
10:35AM 10 COME IN.

10:35AM 11 THE COURT: OKAY. THANK YOU.

10:35AM 12 LET'S MOVE TO NUMBER 9.

10:35AM 13 MS. WALSH: SURE.

10:35AM 14 THE COURT: AND THIS IS -- YOU'RE SEEKING TO
10:35AM 15 INTRODUCE -- I BELIEVE, IS THIS THE PATENT APPLICATION?

10:35AM 16 MS. WALSH: IT IS, YOUR HONOR.

10:35AM 17 AND WHAT IS IMPORTANT TO KNOW ABOUT THIS PATENT
10:35AM 18 APPLICATION IS THAT THIS APPLICATION IS ACTUALLY REFERENCED IN
10:36AM 19 ONE OF THE SLIDE DECKS THAT WENT TO LISA PETERSON, WHO IS ONE
10:36AM 20 OF THE INVESTORS.

10:36AM 21 AND THAT SLIDE DECK HAD A LIST OF PATENTS. ONE OF THOSE
10:36AM 22 PATENTS, NUMBER 61/875,678, WAS FILED ON SEPTEMBER 9TH, 2013.

10:36AM 23 THIS APPLICATION IS -- CORRESPONDS TO THAT ENTRY IN THE
10:36AM 24 SLIDE DECK THAT WENT TO MS. PETERSON.

10:36AM 25 SO, AGAIN, IT'S SIMILAR TO THE FDA DISCLOSURE. IT'S NOT

10:36AM 1 OFFERED FOR THE TRUTH. IT'S OFFERED TO SHOW THE ACT OF
10:36AM 2 THERANOS APPLYING FOR A PATENT, TRYING TO PROTECT ITS
10:36AM 3 INTELLECTUAL PROPERTY, AND THE TECHNOLOGY IS THE MODIFICATION
10:37AM 4 OF COMMERCIAL DEVICES TO BE ABLE TO RUN SMALL FINGERSTICK
10:37AM 5 SAMPLES.

10:37AM 6 THE COURT: SO IT'S THE APPLICATION AND IT'S NOT FOR
10:37AM 7 THE TRUTH OF ANYTHING ASSERTED, IT'S JUST FOR THE FACT THAT
10:37AM 8 THAT THE COMPANY FILED A PATENT APPLICATION ON THIS DATE AND
10:37AM 9 TIME FOR THIS TECHNOLOGY?

10:37AM 10 MS. WALSH: THAT'S RIGHT. CORRECT.

10:37AM 11 THE COURT: MR. LEACH.

10:37AM 12 MR. LEACH: WE OBJECT ON HEARSAY GROUNDS AND 403
10:37AM 13 GROUNDS, YOUR HONOR.

10:37AM 14 THIS IS A PROVISIONAL APPLICATION FOR A PATENT.

10:37AM 15 EVIDENTLY THE DEFENSE ACQUIRED THIS FROM THE FDA'S
10:37AM 16 WEBSITE. THIS IS NOT A PUBLIC RECORD. THIS IS AN APPLICATION
10:37AM 17 BY -- SIGNED BY AN INDIVIDUAL NAMED JAMES FOX, WHO THERE'S NO
10:38AM 18 TESTIMONY ABOUT, CLAIMING THAT SAM GONG, WILLIAM WESTRICK, WHO
10:38AM 19 THE JURY HAS NOT HEARD ABOUT, AND DANIEL YOUNG ARE THE
10:38AM 20 INVESTORS OF A PARTICULAR TECHNOLOGY.

10:38AM 21 THIS IS BEING OFFERED FOR THE TRUTH THAT THIS WAS DONE ON
10:38AM 22 A PARTICULAR DAY AND THAT THESE INDIVIDUALS ARE THE RIGHTFUL
10:38AM 23 PATENTEES OF THIS PARTICULAR TECHNOLOGY.

10:38AM 24 THIS IS A STATEMENT BY THERANOS, NOT A STATEMENT BY THE
10:38AM 25 FDA.

1 AND THERE'S NO EVIDENCE THAT MR. BALWANI SAW THIS.

2 THERE'S NO EVIDENCE THAT THIS WAS FORWARDED TO HIM. THERE'S NO
3 EVIDENCE THAT LISA PETERSON WENT ON THE FDA'S WEBSITE TO TRY TO
4 COMPARE PAGE 100 AND SOMETHING OF A POWERPOINT TO THIS
5 PARTICULAR PATENT.

6 IT'S BEING OFFERED FOR A HEARSAY PURPOSE AND IT HAS
7 POTENTIAL TO MISLEAD AND CONFUSE THE JURY AND FOR THAT REASON
8 IT SHOULD BE EXCLUDED UNDER 403.

9 MS. WALSH: YOUR HONOR, SO I THINK THERE ARE TWO
10 ISSUES WE SHOULD TALK ABOUT. ONE IS AUTHENTICITY, AND THE
11 OTHER IS HEARSAY.

12 SO ON AUTHENTICITY, THIS FALLS SQUARELY WITHIN
13 901(B) (7) (A), WHICH IS EVIDENCE ABOUT PUBLIC RECORDS, EVIDENCE
14 THAT A DOCUMENT WAS RECORDED OR FILED IN A PUBLIC OFFICE AS
15 AUTHORIZED BY LAW, OR A PURPORTED PUBLIC RECORD OR STATEMENT IS
16 FROM THE OFFICE WHERE ITEMS OF THIS KIND ARE KEPT.

17 THIS CLEARLY WAS FILED WITH THE PATENT OFFICE. IT WAS
18 ACCESSIBLE THROUGH THE PATENT OFFICE.

19 IN ADDITION, I THINK THAT THE COURT -- AND I WOULD REQUEST
20 THAT THE COURT TAKE JUDICIAL NOTICE OF THE FACT THAT THIS WAS
21 FILED WITH THE UNITED STATES PATENT OFFICE, AND WHAT I'M
22 REFERRING TO IS RULE 201(C) (2), WHICH SAYS THAT THE COURT MUST
23 TAKE JUDICIAL NOTICE IF A PARTY REQUESTS IT AND THE COURT IS
24 SUPPLIED WITH THE NECESSARY INFORMATION.

25 I THINK THE COURT DOES HAVE THE NECESSARY INFORMATION.

10:40AM 1 THIS IS THE PATENT APPLICATION THAT CORRESPONDS TO THE ENTRY IN
10:40AM 2 THE LISA PETERSON SLIDE DECK.

10:40AM 3 THE COURT: THIS IS JUST THE APPLICATION, AND YOU'RE
10:40AM 4 ASKING THAT THE ENTIRETY, AGAIN, ALL OF THE PAGES, BEHIND IT?

10:40AM 5 MS. WALSH: YES. SO THIS IS A LONG DOCUMENT,
10:40AM 6 YOUR HONOR. I RECOGNIZE THAT.

10:40AM 7 THE COURT: YES.

10:40AM 8 MS. WALSH: AND WE CAN LIMIT THE NUMBER OF PAGES IF
10:40AM 9 THAT IS A CONCERN.

10:40AM 10 AND WHAT I WOULD PROPOSE IS TO LIMIT IT TO THE DOCKET
10:40AM 11 STAMP PAGE NUMBER 162 THROUGH 169, AND THEN THE LAST TWO PAGES,
10:40AM 12 216 TO 217, WHICH IS THE ELECTRONIC ACKNOWLEDGEMENT RECEIPT,
10:41AM 13 AND THAT'S IMPORTANT BECAUSE IT CORRESPONDS TO THE APPLICATION
10:41AM 14 NUMBER THAT IS IN THE PETERSON SLIDE DECK.

10:41AM 15 THE COURT: OKAY.

10:41AM 16 MR. LEACH.

10:41AM 17 MR. LEACH: AGAIN, YOUR HONOR, I THINK IT'S HEARSAY
10:41AM 18 TO SAY THIS PARTICULAR INVENTION CLAIMED BY THIS PARTICULAR
10:41AM 19 GROUP OF PEOPLE CONCERNING THIS PARTICULAR TYPE OF TECHNOLOGY
10:41AM 20 IS HEARSAY.

10:41AM 21 ONE OF THESE INDIVIDUALS SHOULD TESTIFY ABOUT IT.

10:41AM 22 THE AUTHENTICITY PROVISION MS. WALSH IS REFERRING TO I
10:41AM 23 THINK REFERS TO THE FILINGS OF THE AGENCY ITSELF AND NOT
10:41AM 24 SOMETHING ANY THIRD PARTY COULD UPLOAD, SO I TAKE ISSUE WITH
10:41AM 25 THAT.

10:41AM 1 BUT IT'S LARGELY A HEARSAY AND A 403 OBJECTION.

10:41AM 2 THE COURT: THANK YOU.

10:41AM 3 SO THIS IS THE APPLICATION.

10:41AM 4 ARE YOU SAYING, MS. WALSH, THAT MS. PETERSON TESTIFIED
10:42AM 5 ABOUT AN ACTUAL PATENT BEING ISSUED THAT CORRESPONDS TO THE
10:42AM 6 APPLICATION?

10:42AM 7 MR. COOPERSMITH: NO, SHE DIDN'T TESTIFY ABOUT THAT.

10:42AM 8 IT'S JUST THAT IN THE SLIDE DECK THAT SHE WAS PROVIDED
10:42AM 9 WITH THAT SHE SAID SHE REVIEWED, I THINK SHE SAID SHE REVIEWED
10:42AM 10 IT CAREFULLY, BUT REGARDLESS, IT WAS INCLUDED IN A LIST OF
10:42AM 11 PATENTS, BOTH PATENTS THAT WERE FILED AND PATENTS THAT WERE
10:42AM 12 ISSUED.

10:42AM 13 THIS IS ONE OF THE PATENTS, AND IT'S THE PATENT THAT
10:42AM 14 CORRESPONDS TO THE ALTERATION, THE MODIFICATION OF THOSE
10:42AM 15 COMMERCIAL DEVICES TO DO FINGERSTICK SAMPLES ON THOSE DEVICES.

10:42AM 16 THE COURT: SO IS -- WAS A PATENT ISSUED?

10:42AM 17 MS. WALSH: EVENTUALLY IT WAS.

10:42AM 18 THE COURT: IS THERE A VACUUM IN THE INFORMATION
10:42AM 19 THEN? IF YOU SAY THERE WAS JUST AN APPLICATION, WHAT DOES THE
10:42AM 20 JURY DO WITH THAT?

10:42AM 21 I GUESS I'M LOOKING AT THAT THROUGH A 403 LENS. WHAT DOES
10:42AM 22 THIS TELL US IF THERE'S JUST AN APPLICATION?

10:43AM 23 MS. WALSH: RIGHT, YOUR HONOR.

10:43AM 24 SO I GUESS THE APPLICATION HAD THE DATE. I THINK IT WAS
10:43AM 25 THE DATE WAS RELEVANT. IN SEPTEMBER OF 2013 THIS APPLICATION

10:43AM 1 WAS MADE. THAT'S A DATE WITHIN THE CHARGED CONSPIRACY AND
10:43AM 2 AROUND AND NEAR THE TIME THERANOS WAS SPEAKING TO INVESTORS, SO
10:43AM 3 I THINK WE KEYED IT OFF OF THAT.

10:43AM 4 BUT THE PATENT WAS ULTIMATELY ISSUED.

10:43AM 5 THE COURT: IS THERE EVIDENCE IN THE RECORD THAT THE
10:43AM 6 PATENT WAS ISSUED, THIS PATENT WAS ISSUED?

10:43AM 7 DO YOU KNOW, MR. LEACH?

10:43AM 8 MR. LEACH: NOT THAT I'M AWARE OF, YOUR HONOR.

10:43AM 9 AND I DON'T HAVE KNOWLEDGE WHETHER IT WAS, IN FACT,
10:43AM 10 ISSUED.

10:43AM 11 MS. WALSH: SO, YOUR HONOR, WE'RE HAPPY TO OFFER THE
10:43AM 12 ENTIRE PATENT INTO EVIDENCE TO CLEAR THAT UP, TO CLOSE THAT
10:43AM 13 LOOP.

10:43AM 14 THE COURT: OKAY. ANYTHING ELSE ON 9?

10:44AM 15 MS. WALSH: NO, YOUR HONOR.

10:44AM 16 MR. LEACH: NO, YOUR HONOR.

10:44AM 17 THE COURT: ALL RIGHT. THANK YOU. THANK YOU FOR
10:44AM 18 THE DISCUSSION.

10:44AM 19 I'M GOING TO REVIEW OUR DISCUSSION AND HOPEFULLY GET AN
10:44AM 20 ORDER OUT PERHAPS THIS AFTERNOON FOR YOU.

10:44AM 21 LET'S MOVE ON TO JUST SOME OTHER DISCUSSIONS ABOUT OUR
10:44AM 22 SCHEDULE.

10:44AM 23 SO OUR JURY IS COMING IN TOMORROW, AND I GUESS,
10:44AM 24 MR. COOPERSMITH, WILL YOU SPEAK TO OUR SCHEDULING, WHERE WE ARE
10:44AM 25 AT AND WHAT WE'RE DOING?

10:44AM 1 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

10:44AM 2 THE COURT: SO WE HAVE OUR JURY COMING IN TOMORROW.

10:44AM 3 YOU'LL HAVE A WITNESS TO GO FORWARD TOMORROW?

10:44AM 4 MR. COOPERSMITH: YES, YOUR HONOR. AND WE'VE

10:44AM 5 INFORMED THE GOVERNMENT OF THIS AS WELL.

10:44AM 6 THE COURT: OKAY.

10:44AM 7 MR. COOPERSMITH: WE HAVE TWO WITNESSES THAT WE

10:44AM 8 INTEND TO CALL TOMORROW. ONE IS THE SUBJECT OF DISCUSSION THAT

10:44AM 9 THE COURT JUST HAD, MR. YOUSKE OKANO, WHO IS A PARALEGAL AT

10:45AM 10 ORRICK; AND THE OTHER IS RICHARD SONNIER, WHO THE COURT IS

10:45AM 11 FAMILIAR WITH FROM THE MOTION PRACTICE, AND THIS IS THE EXPERT

10:45AM 12 ON THE LIS SYSTEM.

10:45AM 13 THE DEFENSE ANTICIPATES RESTING AFTER THOSE WITNESSES.

10:45AM 14 OBVIOUSLY, OF COURSE, WE UNDERSTAND THAT MR. BALWANI HAS A

10:45AM 15 RIGHT TO TESTIFY. AT THIS POINT WE DON'T ANTICIPATE THAT.

10:45AM 16 OBVIOUSLY MR. BALWANI CAN SLEEP ON THAT AND GIVE US HIS FINAL

10:45AM 17 DECISION.

10:45AM 18 THE COURT: SURE.

10:45AM 19 MR. COOPERSMITH: BUT THAT IS WHERE WE CURRENTLY ARE

10:45AM 20 AND THAT IS WHAT WE ANTICIPATE.

10:45AM 21 THE COURT: OKAY. THANK YOU.

10:45AM 22 MR. SCHENK: THANK YOU, YOUR HONOR.

10:45AM 23 I THINK THE GOVERNMENT NEEDS TO SEE THE COMPLETION OF THE

10:45AM 24 DEFENSE CASE. IF THIS HOLDS TRUE, WE HAVE HEARD ONE OF THREE

10:45AM 25 WITNESSES, AND WHEN WE HEAR THE TESTIMONY OF THE REMAINING TWO

10:45AM 1 WITNESSES, WE'LL BE IN A POSITION TO MAKE A DETERMINATION
10:45AM 2 REGARDING ANY GOVERNMENT REBUTTAL CASE.

10:45AM 3 I UNDERSTAND THAT THAT MAY CAUSE SOME CHALLENGES FOR
10:46AM 4 ALERTING THE JURY WHEN THE NEXT TIME THEY SHOULD COME BACK
10:46AM 5 WOULD BE, SO I THOUGHT AHEAD TO THAT AND I HAVE A SUGGESTION,
10:46AM 6 BUT OBVIOUSLY WE'LL TAKE DIRECTION FROM THE COURT.

10:46AM 7 IF WE ASSUME THAT WE COMPLETE THE DEFENSE CASE TOMORROW IN
10:46AM 8 THE EARLY AFTERNOON, THAT'S OBVIOUSLY A VERY ROUGH ESTIMATE,
10:46AM 9 BUT AT SOME POINT THAT FILLS THE MORNING BUT MAYBE DOES NOT
10:46AM 10 FILL THE WHOLE AFTERNOON, I THINK WHAT WE WOULD ASK IS TO
10:46AM 11 TAKE --- TO END THE DAY AND TO GIVE THE GOVERNMENT TEAM THE
10:46AM 12 OPPORTUNITY TO SIT AROUND A TABLE AND TALK FOR AN HOUR OR TWO
10:46AM 13 ABOUT WHETHER WE'RE GOING TO PUT ON A REBUTTAL CASE, AND THEN
10:46AM 14 ALERT THE COURT AND THE DEFENSE SO THAT THE COURT COULD THEN
10:46AM 15 CONTACT THE JURY AND PROVIDE AN ANSWER FOR WHETHER THEY NEED TO
10:46AM 16 COME BACK ON WEDNESDAY, OR NOT, FOR A GOVERNMENT REBUTTAL CASE.

10:46AM 17 I APPRECIATE THAT THAT RELIES A LITTLE BIT ON PRECISELY
10:46AM 18 WHAT TIME WE END AND WHAT TIME THESE EMAILS COULD GO OUT, SO
10:47AM 19 THERE MIGHT BE SOME NEED TO REFINE THAT SUGGESTION WHEN WE KNOW
10:47AM 20 PRECISELY WHAT TIME WE'RE BREAKING TOMORROW.

10:47AM 21 BUT I THINK THE GOVERNMENT WOULD BENEFIT FROM AT LEAST AN
10:47AM 22 HOUR OR TWO AFTER THE DEFENSE CASE ENDS TO MAKE THAT DECISION.

10:47AM 23 THE COURT: SURE.

10:47AM 24 DO YOU HAVE ANY OBJECTION TO THAT?

10:47AM 25 MR. COOPERSMITH: NO, YOUR HONOR. I THINK IT'S A

10:47AM 1 HELPFUL SUGGESTION. WE'RE HAPPY TO GIVE THE GOVERNMENT THAT
10:47AM 2 TIME. WE ANTICIPATE OUR WITNESSES WOULD CERTAINLY FILL THE
10:47AM 3 MORNING, AND MAYBE STRAY INTO SOME PART OF THE AFTERNOON. I
10:47AM 4 DON'T KNOW WHAT THE CROSS IS OBVIOUSLY.

10:47AM 5 BUT WE THINK THAT MAKES SENSE.

10:47AM 6 THE ONLY THING I WOULD ASK, AND AS I THINK I SAID BEFORE,
10:47AM 7 MR. SCHENK WAS COURTEOUS YESTERDAY -- I'M SORRY, FRIDAY -- TO
10:47AM 8 GIVE US THE POTENTIAL WITNESSES THAT THE GOVERNMENT MIGHT CALL
10:47AM 9 IN REBUTTAL IF THEY CHOOSE TO DO THAT.

10:47AM 10 I WOULD JUST ASK THAT WE ARE INFORMED THAT THOSE ARE THE
10:47AM 11 LIMIT, OR IF THEY WANT TO NARROW THE LIST, THAT'S ALSO FINE,
10:47AM 12 BUT JUST SO WE KNOW WHAT WE CAN ANTICIPATE SO WE CAN PREPARE.

10:47AM 13 BUT OTHER THAN THAT, I THINK MR. SCHENK'S SUGGESTION IS A
10:47AM 14 GOOD ONE, AND WE WOULD AGREE WITH THAT.

10:47AM 15 THE COURT: OKAY. THANK YOU.

10:48AM 16 WE HAVE AVAILABLE THE 16TH ALSO, I BELIEVE, FOR OUR JURY.
10:48AM 17 I THINK WE'VE CLEARED OUR DAY FOR THAT AS WELL, RIGHT, MADAM
10:48AM 18 CLERK?

10:48AM 19 THE CLERK: YES.

10:48AM 20 THE COURT: SO WE HAVE THE ENTIRE WEEK.

10:48AM 21 SHOULD WE -- ONE THING WE ALL NEED TO THINK ABOUT, AND I
10:48AM 22 THINK COUNSEL TOLD ME THIS AS WELL -- WE NEED TO THINK ABOUT
10:48AM 23 WHEN WE WOULD HAVE OUR CHARGING CONFERENCE. MY SENSE IS THAT
10:48AM 24 THAT IS GOING TO TAKE A DAY, A FULL DAY TO DISCUSS, AND THE
10:48AM 25 COURT HOPEFULLY TO BE ABLE TO PREPARE FINAL INSTRUCTIONS.

1 AND THEN THE QUESTION COMES, WHEN SHOULD WE THEN SCHEDULE
2 ARGUMENT? WE COULD -- IT SOUNDS LIKE, IF ALL OF THIS FALLS IN
3 PLACE, WE COULD HAVE A SITUATION WHERE ARGUMENT -- FRIDAY, THE
4 17TH, MIGHT BE AVAILABLE FOR ARGUMENT.

5 I'M, I'M -- IT'S NOT MY PREFERENCE TO HAVE ARGUMENTS
6 BROKEN UP BY A WEEKEND, AND MY PREFERENCE WOULD BE TO HAVE
7 ARGUMENTS COMPLETED CONSECUTIVELY WITHOUT A BREAK, AND THAT
8 WOULD BRING US TO THE 21ST AND 22ND.

9 AND, OF COURSE, I BELIEVE WE HAVE THE AFTERNOON OF THE
10 23RD SCHEDULED AVAILABLE AS WELL.

11 MR. COOPERSMITH: I MIGHT BE OFF ON MY DATES HERE,
12 BUT I THOUGHT THE COURT WAS IN SESSION ON TUESDAY THE 14TH AND
13 WEDNESDAY THE 15TH.

14 IS THAT CORRECT?

15 THE COURT: THAT IS CORRECT.

16 MR. COOPERSMITH: OKAY.

17 THE COURT: I'M SORRY. I'M A WEEK AHEAD OF MYSELF.

18 MR. COOPERSMITH: I WAS WONDERING.

19 THE COURT: SORRY. I WAS LOOKING AT THE SCHEDULE
20 AND THE WRONG WEEK. YES, IT'S THE 14TH AND 15TH.

21 WE HAVE TRIAL SCHEDULED ON THE 13TH IN THE AFTERNOON, WE
22 HAVE THAT AVAILABLE AS WELL, BUT I'M NOT SURE ANYONE WANTS TO
23 START AN ARGUMENT RECOGNIZING THERE WOULD BE A NATURAL BREAK TO
24 IT.

25 ALL RIGHT. I THROW THAT OUT FOR DISCUSSION.

10:50AM 1 THE COURT ISSUED ITS ORDER ON THE LIS MOTION, I'M GOING TO
10:50AM 2 CALL IT THAT, IN 1464, AND I DID HAVE SOME -- WELL, YOU READ
10:50AM 3 THE ORDER. YOU KNOW WHAT IT SAYS.

10:50AM 4 I'M PAUSING BECAUSE I JUST WANT TO KNOW WHETHER OR NOT THE
10:50AM 5 ORDER WAS INSTRUCTIVE TO THE PARTIES AS TO WHAT THEY CAN PUT
10:50AM 6 ON, WHAT THEY MAY PUT ON, WHAT THE COURT MIGHT HAVE SOME ISSUE
10:50AM 7 WITH, AND WHETHER OR NOT WE NEED TO DISCUSS THAT AS OPPOSED TO
10:50AM 8 HAVING A DISCUSSION, SHALL I SAY, IN REALTIME WHEN YOUR EXPERT
10:50AM 9 TESTIFIES.

10:50AM 10 MR. BOSTIC.

10:50AM 11 MR. BOSTIC: THANK YOU, YOUR HONOR.

10:51AM 12 GOOD MORNING. LET ME SWITCH MASKS. THAT MIGHT MAKE IT
10:51AM 13 EASIER HERE.

10:51AM 14 IT'S A LITTLE DIFFICULT FOR THE GOVERNMENT TO ANSWER THAT
10:51AM 15 QUESTION WITHOUT HAVING SEEN THE DIRECT.

10:51AM 16 I DO STILL HAVE SOME CONCERNS. I FOUND THE COURT'S ORDER
10:51AM 17 HELPFUL AND CLEAR, OF COURSE.

10:51AM 18 BUT I HAVE SOME CONCERNS ABOUT THE DEFENSE'S PLANS FOR
10:51AM 19 ESTABLISHING SOME OF THE FACTS THAT MR. SONNIER WON'T HAVE
10:51AM 20 PERSONAL KNOWLEDGE OF.

10:51AM 21 SO IT'S DIFFICULT FOR ME TO PICTURE THE MECHANICS OF THE
10:51AM 22 DIRECT AND HOW THE FRAMEWORK OF FACTS THAT UNDERLIE HIS OPINION
10:51AM 23 WILL BE ESTABLISHED.

10:51AM 24 SO I HAVE SOME CONCERNS ABOUT THAT, AND I WONDER IF A
10:51AM 25 DISCUSSION OF THAT MIGHT BE HELPFUL AT THIS POINT IN PLANNING

10:51AM 1 THE CROSS-EXAMINATION. OBVIOUSLY I DON'T WANT TO REVEAL
10:51AM 2 DETAILS OF THAT ACTUALLY.

10:51AM 3 THE COURT: SURE.

10:51AM 4 MR. BOSTIC: BUT I --

10:51AM 5 THE COURT: I'M SORRY, GO AHEAD.

10:51AM 6 MR. BOSTIC: ALL I WAS GOING TO SAY WAS THAT I WANT
10:51AM 7 TO UNDERSTAND KIND OF HOW FACTS ARE GOING TO BE DEALT WITH THAT
10:52AM 8 AREN'T WITHIN THIS WITNESS'S PERSONAL KNOWLEDGE SO THAT I CAN
10:52AM 9 TAKE A CONSISTENT APPROACH DURING THE CROSS.

10:52AM 10 MR. COOPERSMITH: I'M HAPPY TO TRY TO HELP THERE,
10:52AM 11 YOUR HONOR.

10:52AM 12 SO MR. SONNIER IS AN EXPERT WITNESS. WE INTEND TO QUALIFY
10:52AM 13 HIM AS AN EXPERT WITNESS. I DON'T ANTICIPATE AN ISSUE THERE,
10:52AM 14 BUT OBVIOUSLY THE GOVERNMENT CAN ASK.

10:52AM 15 AND LIKE ANY EXPERT THAT HAS PROBABLY EVER TESTIFIED, HE
10:52AM 16 DOESN'T HAVE PERSONAL KNOWLEDGE OF THE FACTS. HE'S AN EXPERT,
10:52AM 17 RIGHT?

10:52AM 18 HE'S BEEN PROVIDED -- EXCUSE ME. HE'S BEEN PROVIDED WITH
10:52AM 19 UNDERLYING INFORMATION THAT EXPERTS IN HIS POSITION TYPICALLY
10:52AM 20 RELY ON.

10:52AM 21 SO IN TERMS OF WHAT WE INTEND, AND I THINK MR. BRECHER
10:52AM 22 SAID THIS THE OTHER DAY, SO IT'S NO SECRET AND I DON'T MIND
10:52AM 23 SHARING THIS OPENLY, HE IS GOING TO TESTIFY ABOUT HIS
10:52AM 24 QUALIFICATIONS. HE'S GOING TO TESTIFY ABOUT HIS WORK ON THIS.

10:52AM 25 IN TERMS OF THE FACTS THAT MR. BOSTIC IS SUGGESTING, I

10:52AM 1 THINK IN FAIRNESS -- AND THIS IS WHAT MR. BRECHER SAID -- I
10:53AM 2 THINK WE SHOULD DO THIS AND I DON'T THINK THERE WILL BE AN
10:53AM 3 OBJECTION TO THIS, HE WILL TESTIFY HE UNDERSTANDS THAT IN THE
10:53AM 4 MATERIALS THAT HE REVIEWED, THERE WAS A COPY OF THE LIS
10:53AM 5 PROVIDED TO THE GOVERNMENT, AND ULTIMATELY PROVIDED TO THE
10:53AM 6 DEFENSE, THAT IS NOT ACCESSIBLE, THAT THERE'S NO ENCRYPTION KEY
10:53AM 7 AND THERE'S NO ABILITY TO ACCESS THAT. OKAY?

10:53AM 8 SO THAT'S A BASELINE. I THINK THE GOVERNMENT HAS TAKEN
10:53AM 9 THAT POSITION MANY TIMES THAT THAT IS THE CASE.

10:53AM 10 AND HE IS NOT PLANNING TO TRY TO ATTRIBUTE SOME FAULT ON
10:53AM 11 THE GOVERNMENT'S PART FOR THAT BEING THE CASE; IN OTHER WORDS,
10:53AM 12 THERANOS PRODUCING SOMETHING.

10:53AM 13 NOW, CLEARLY MR. BALWANI DIDN'T PRODUCE IT, AND I THINK HE
10:53AM 14 WILL -- HE'S AWARE OF OTHER EVIDENCE IN THIS CASE THAT
10:53AM 15 MR. BALWANI LEFT THERANOS IN THE SPRING OF 2016. SO WE WANT TO
10:53AM 16 MAKE SURE THAT THAT'S CLEAR.

10:53AM 17 BUT IN TERMS OF WE'RE NOT GOING TO FAULT THE GOVERNMENT
10:54AM 18 FOR GETTING A HARD DRIVE THAT THEY COULDN'T ACCESS BECAUSE IT
10:54AM 19 COULDN'T BE ACCESSED.

10:54AM 20 WHAT HE WILL TESTIFY ABOUT, THOUGH, MOVING FORWARD IS THAT
10:54AM 21 WE UNDERSTAND THE COURT'S ORDER THAT THE BRADY LETTER ITSELF
10:54AM 22 WILL NOT BE ADMISSIBLE. OBVIOUSLY MR. SONNIER READ THAT, BUT
10:54AM 23 IT WON'T BE SHOWN TO THE JURY, BUT IT FORMS SOME INFORMATION
10:54AM 24 THAT HE HAD.

10:54AM 25 BUT IN PARTICULAR, WE DID GET THE GOVERNMENT'S PRODUCTION

10:54AM 1 THAT THE COURT ORDERED ON THE MORNING OF JUNE 2ND AS ORDERED BY
10:54AM 2 THE COURT, AND AMONG THE PAPERS THAT WERE PRODUCED IS THE
10:54AM 3 ACTUAL EMAIL FROM THE GOVERNMENT ALS SUPERVISOR, AND I DON'T
10:54AM 4 HAVE THE NUMBER IN FRONT OF ME, BUT I THINK WE ALL KNOW WHAT
10:54AM 5 I'M TALKING ABOUT, IT'S AN EMAIL THAT INFORMS THE GOVERNMENT OF
10:54AM 6 CERTAIN OPTIONS THAT THE GOVERNMENT MIGHT HAVE IN ORDER TO TRY
10:54AM 7 TO ACCESS THE LIS SYSTEM.

10:55AM 8 AND ONE OF THEM IS GO GET THE ORIGINAL SERVERS, AND ONE OF
10:55AM 9 THEM IS HIRE AN OUTSIDE VENDOR.

10:55AM 10 SO WE -- UNDER RULE 703, MR. SONNIER CAN RELY ON THAT
10:55AM 11 INFORMATION. HE CAN CERTAINLY DISCUSS IT AT A MINIMUM.

10:55AM 12 BUT UNDER RULE 703, WE ALSO CAN ADMIT THAT DOCUMENT, AND I
10:55AM 13 THINK THERE'S A FEW REASONS WHY IT WOULD BE ADMISSIBLE.

10:55AM 14 ONE IS IT'S ADMISSIBLE UNDER 703 IT IS, IN THE COURT'S
10:55AM 15 DISCRETION, BECAUSE IT'S SOMETHING THAT INFORMS THE COURT'S
10:55AM 16 DISCRETION, IT'S SOMETHING THAT INFORMS THE EXPERT'S OPINION,
10:55AM 17 RATHER, AND THAT'S WITHIN THE COURT'S DISCRETION TO ADMIT THAT
10:55AM 18 DOCUMENT UNDER 703.

10:55AM 19 IN ADDITION, THERE'S A SEPARATE BASIS FOR ADMISSIBILITY OF
10:55AM 20 THAT PARTICULAR EMAIL, WHICH IS THAT IT'S A PARTY ADMISSION
10:55AM 21 UNDER 801.

10:55AM 22 AND I UNDERSTAND THE COURT'S RULING ON THE BRADY LETTER
10:55AM 23 ITSELF, BUT THIS IS A GOVERNMENT EMPLOYEE, THIS ALS SUPERVISOR,
10:55AM 24 ACTING WITHIN THE SCOPE OF HIS DUTIES, WHO IS WRITING AN EMAIL,
10:56AM 25 AND IT'S THE SAME THING AS WHY LOTS OF EMAILS HAVE COME IN THAT

MR. BALWANI WROTE IN THIS CASE, HE'S A PARTY OPPONENT, AND IN FAIRNESS THE GOVERNMENT WAS ABLE TO ADMIT THEM IN ITS CASE.

AND THIS IS AN ALS SUPERVISOR AND IT'S ADMISSIBLE UNDER 801.

SO THERE ARE ACTUALLY TWO DIFFERENT BASES OF ADMISSION OF THAT PARTICULAR EMAIL. IT'S NOT THE BRADY LETTER. IT'S THE EMAIL THAT WE RECEIVED WITH THE COURT ORDERED PRODUCTION ON JUNE 2ND.

THAT'S REALLY IT. BEYOND THAT, MR. SONNIER WILL TESTIFY, AS YOU'VE SEEN IN HIS DECLARATION, THAT BASED ON THE INFORMATION AND HIS EXPERTISE AND HIS STUDYING OF THE DOCUMENTATION THAT HE HAS SEEN ABOUT WHAT THE LIS SYSTEM WAS, THAT IT WAS A MICROSOFT SQL SERVER SYSTEM, AND HE'S FAMILIAR WITH THAT AND HOW THESE THINGS WORK.

AND HE'S GOING TO TESTIFY THAT, IN HIS EXPERT OPINION, IF THE GOVERNMENT HAD PURSUED THE SERVERS, THAT WOULD HAVE WORKED.

AND I THINK THAT'S CONSISTENT WITH WHAT MR. BRECHER SAID THE OTHER DAY, AND THAT IS THE BASIC SUMMARY OF THE TESTIMONY.

THE COURT: OKAY. THANK YOU.

MR. BOSTIC.

MR. BOSTIC: JUST A FEW THINGS, YOUR HONOR.

FIRST, IT SOUNDS LIKE THERE'S A FRAMEWORK OF FACTS THAT NEED TO BE ESTABLISHED IN ORDER FOR THIS EXPERT'S OPINION TO MAKE SENSE.

FOR EXAMPLE, THE FACT THAT THERANOS DISASSEMBLED THE

10:57AM 1 ORIGINAL LIS EQUIPMENT, IN ORDER FOR THE EXPERT'S OPINION TO BE
10:57AM 2 RELEVANT AND MAKE SENSE, THE JURY NEEDS TO UNDERSTAND THAT THE
10:57AM 3 ORIGINAL WAS DISASSEMBLED AT SOME POINT, THAT IT'S NO LONGER
10:57AM 4 AVAILABLE, BECAUSE THE EXPERT IS GOING TO BE TALKING ABOUT THE
10:57AM 5 FEASIBILITY OF RECONSTRUCTING IT.

10:57AM 6 SO I ASSUME THAT AT SOME POINT DURING THE DIRECT THAT FACT
10:57AM 7 WILL NEED TO BE ESTABLISHED.

10:57AM 8 I'M NOT SURE HOW THIS EXPERT ESTABLISHES THE FACT THAT
10:57AM 9 THERANOS DISASSEMBLED THE LIS DATABASE.

10:57AM 10 IF THAT FACT IS ESTABLISHED THROUGH THIS EXPERT, WILL THE
10:57AM 11 TIMING OF THAT DISASSEMBLY ALSO WILL BE ESTABLISHED? AND IF
10:57AM 12 NOT, CAN THAT THEN BE ESTABLISHED ON CROSS SO THAT A COMPLETE
10:58AM 13 PICTURE IS PROVIDED?

10:58AM 14 THAT'S AN EXAMPLE OF THE KINDS OF QUESTIONS THAT I HAVE.

10:58AM 15 THE COURT: WELL, THIS IS SOMETHING THAT I WAS
10:58AM 16 TRYING TO IDENTIFY IN THE COURT'S ORDER, AND CERTAINLY IN OUR
10:58AM 17 DISCUSSIONS ABOUT THIS ISSUE MANY TIMES. THESE ARE CONCERNS
10:58AM 18 THAT I HAVE. CALL THEM FOUNDATIONAL. CALL THEM FULSOME
10:58AM 19 EXPLANATION OF WHAT TOOK PLACE.

10:58AM 20 AND WE ALL KNOW, AT LEAST WE HAVE SOME IDEA OF THE FACTS
10:58AM 21 OF THAT, AND THEN IT'S REALLY DEPENDENT ON --

10:58AM 22 I SUPPOSE IT'S DRIVEN, MR. COOPERSMITH, BY YOUR EXPERT AND
10:58AM 23 HOW MUCH AND HOW FAR AND HOW DEEP YOU GO.

10:58AM 24 THE COURT'S MIL ORDER TALKED ABOUT THIS, AS WELL AS THE
10:58AM 25 COURT'S MOST RECENT, AND WE'VE USED THE PHRASE OPENING THE DOOR

1 SEVERAL TIMES IN THIS REGARD.

2 BUT THAT'S THE CONCERN I HAVE. I APPRECIATE THE
3 CONVERSATION THIS MORNING JUST TO INFORM ME AS TO WHAT IT IS
4 THAT THE PARTIES HAD IN MIND.

5 WHAT WOULD BE HELPFUL FOR ME, IF YOU WISH, IS TO SUBMIT TO
6 ME AT LEAST A COPY OF THE EMAIL THAT YOU'RE GOING TO SEEK TO
7 INTRODUCE. THAT WOULD BE HELPFUL FOR ME TO SEE IN ADVANCE AS
8 WELL.

9 MR. COOPERSMITH: YES, YOUR HONOR. I DON'T HAVE A
10 COPY WITH ME. WE CAN SUBMIT IT RIGHT AFTER COURT.

11 THE COURT: SURE.

12 MR. COOPERSMITH: AND LET ME SEE IF I CAN ALLAY SOME
13 OF THE FEARS OR CONCERNS THAT MR. BOSTIC HAS.

14 THERE IS NO DISPUTE IN THIS CASE THAT AT THE END OF
15 AUGUST OF 2018, I BELIEVE IT WAS AROUND AUGUST 30TH, THAT
16 THERANOS -- NOT MR. BALWANI, HE HAD LEFT THE COMPANY TWO YEARS
17 EARLIER -- BUT THERANOS DISASSEMBLED, DISMANTLED, WHATEVER YOU
18 HAVE IT, THE LIS SYSTEM AS IT WAS SITTING THERE IN THE NEWARK,
19 CALIFORNIA THERANOS.

20 THERE'S NO DISPUTE ABOUT THAT. WE'RE HAPPY TO INTRODUCE
21 THAT ON DIRECT. IF WE DIDN'T, I'M SURE THE GOVERNMENT WOULD
22 SHOW THAT ON CROSS.

23 THE COURT: DIRECT OF MR. SONNIER?

24 MR. COOPERSMITH: YES, YOUR HONOR.

25 AND THE REASON WHY THAT IS PROPER IS, UNDER RULE 703, THE

11:00AM 1 EXPERT CAN BASE AN OPINION ON FACTS OR DATA IN THE CASE THAT
11:00AM 2 HE'S BEEN MADE AWARE OF OR PERSONALLY OBSERVED.

11:00AM 3 IN THIS CASE HE'S BEEN MADE AWARE OF THOSE FACTS BY
11:00AM 4 READING A LOT OF DISCOVERY THAT THE GOVERNMENT ITSELF PROVIDED.
11:00AM 5 THEY INTERVIEWED WITNESSES AND THEY PROVIDED THOSE 302'S, AND
11:00AM 6 OTHER INFORMATION THAT THEY PROVIDED, EMAILS, THINGS OF THAT
11:00AM 7 NATURE.

11:00AM 8 AND IT'S NOT NECESSARY TO ADMIT THOSE, ALTHOUGH THEY
11:00AM 9 PROBABLY WOULD BE ADMISSIBLE UNDER 703.

11:00AM 10 IT'S REALLY JUST A MATTER OF HIM SAYING, I READ A BODY OF
11:00AM 11 INFORMATION, THIS IS WHAT I RELIED ON, AND THIS IS WHY
11:00AM 12 MR. SONNIER WILL TESTIFY THAT HE KNOWS THAT THERANOS
11:00AM 13 DISASSEMBLED THE SYSTEM.

11:00AM 14 HE'S NOT GOING TO SAY, NOR COULD HE SAY, IT'S THE
11:00AM 15 GOVERNMENT, YOU KNOW, WHO DISASSEMBLED THE SYSTEM.

11:00AM 16 THEY DIDN'T DO THAT. IT WAS THERANOS WHO DID THAT.

11:00AM 17 I THINK THAT WILL BE WHAT HAPPENS. WE EXPECT TO ELICIT
11:00AM 18 THAT TESTIMONY ON DIRECT.

11:00AM 19 SO I DON'T THINK THAT SHOULD BE CONTROVERSIAL.

11:01AM 20 IT'S REALLY WHAT HAPPENS AFTER THAT THAT IS INTERESTING TO
11:01AM 21 US.

11:01AM 22 AND THE ONLY DOCUMENT THAT I CAN REALLY THINK OF THAT IS
11:01AM 23 INFORMATIVE ON THAT IS THIS EMAIL THAT, AS THE COURT JUST SAID,
11:01AM 24 WE'LL SUBMIT IN A LITTLE BIT AFTER COURT.

11:01AM 25 THE COURT: OKAY.

11:01AM 1 MR. BOSTIC: SO HERE'S WHERE THE QUESTION MARKS COME
11:01AM 2 UP FOR ME.

11:01AM 3 OF COURSE AN EXPERT CAN BASE HIS OR HER OPINION ON
11:01AM 4 HEARSAY. BUT THAT'S A LITTLE DIFFERENT FROM HAVING AN EXPERT
11:01AM 5 TAKE THE STAND AND THEN ESTABLISH FACTS THAT THE EXPERT ONLY
11:01AM 6 KNOWS THROUGH HEARSAY.

11:01AM 7 SO THE FACT THAT AN EXPERT MAY HAVE READ GOVERNMENT MOI'S,
11:01AM 8 302'S, DEPOSITIONS, AND THEN HAS AN UNDERSTANDING THAT CERTAIN
11:01AM 9 EVENTS OCCURRED IS ONE THING.

11:01AM 10 BUT FOR THE EXPERT THEN TO BE THE ONE WHO SAYS, "AND THEN
11:01AM 11 THIS HAPPENED, AND THEN THAT HAPPENED," TALKING ABOUT EVENTS
11:01AM 12 THAT HAPPENED YEARS EARLIER OUTSIDE OF THE EXPERT'S
11:01AM 13 OBSERVATION, THAT'S A LITTLE DIFFERENT FROM WHAT EXPERTS
11:01AM 14 TYPICALLY DO. SO THAT'S WHERE CONCERNS COME UP FOR ME.

11:02AM 15 ON THE TOPIC OF THE EMAIL ITSELF, THE INTERNAL GOVERNMENT
11:02AM 16 EMAIL RELAYING RECOMMENDATIONS OR INFORMATION FROM A STAFF
11:02AM 17 MEMBER, FIRST, I'M NOT SURE THAT A STATEMENT BY ANY GOVERNMENT
11:02AM 18 EMPLOYEE CONSTITUTES A PARTY ADMISSION.

11:02AM 19 YOU KNOW, IT'S ONE THING WHEN A DEFENDANT MAKES A
11:02AM 20 STATEMENT.

11:02AM 21 A SIMILAR ARGUMENT COULD BE MADE ABOUT AN ATTORNEY
11:02AM 22 REPRESENTING A PARTY POSSIBLY IN SOME SITUATIONS.

11:02AM 23 BUT I'M NOT SURE IT'S A FAIR READING TO SAY THAT THAT
11:02AM 24 EXPANDS TO EVERY EMPLOYEE ON THE GOVERNMENT SIDE, SO I'M NOT
11:02AM 25 SURE THAT'S ESTABLISHED.

1 AND WHEN IT COMES TO RELEVANCE, AGAIN, I'M NOT SURE WHY
2 INFORMATION PROVIDED TO PROSECUTORS IS RELEVANT TO THIS
3 WITNESS'S OPINION ABOUT WHAT CAN BE DONE WITH AN SQL DATABASE.

4 IT SEEMS LIKE THIS EMAIL IS RELEVANT TO A PROSECUTOR'S
5 STATE OF MIND, AND IT'S NOT CLEAR WHY THAT IS AT ISSUE IN THIS
6 CASE, AND IF IT IS, THAT WOULD AFFECT THE SCOPE OF THE CROSS AS
7 WELL.

8 MR. COOPERSMITH: YOUR HONOR, ON THAT POINT, THIS IS
9 JUST RELITIGATING THE LIS MOTION THAT THE COURT JUST RULED ON.

10 THIS WAS THE WHOLE GOVERNMENT POSITION, THAT THIS WAS A
11 RELEVANCE PROBLEM, AND THE FACT THAT THE PROSECUTION WAS AT
12 FAULT SHOULDN'T BE -- WELL, ACCORDING TO US, RIGHT -- SHOULDN'T
13 BE ADMISSIBLE.

14 AND THE COURT HAS ALREADY RULED ON THAT. SO THE COURT HAS
15 RULED, AFTER TAKING INTO ACCOUNT LOTS OF BRIEFING AND ARGUMENT
16 OVER, FRANKLY, YEARS, THAT THIS IS ADMISSIBLE FOR THE PURPOSES
17 THAT THE COURT STATED.

18 AND WE UNDERSTAND THE LANE THAT THE COURT HAS PROVIDED AND
19 WE INTEND TO STAY WITHIN THAT LANE.

20 BUT FOR MR. BOSTIC TO NOW SAY THAT HE HAS A RELEVANCE
21 ISSUE, IT'S JUST RELITIGATING THE SAME THING.

22 SO THE HEART OF IT, THE WHOLE PURPOSE OF THE ADMISSIBILITY
23 OF THIS EVIDENCE, AS THE COURT HAS ALREADY RULED, IS TO SHOW
24 THAT THE GOVERNMENT HAD NOTICE, THEY WERE INFORMED THAT GETTING
25 THE SERVER WAS AN OPTION, AND THAT'S THE EMAIL THAT WE NOW HAVE

11:04AM 1 AND IT'S WHAT UNDERLIES THE BRADY LETTER. IT'S, IT'S NOW
11:04AM 2 SOMETHING THAT CAN BE ADMITTED, AND WE'LL TALK ABOUT THAT MORE
11:04AM 3 IN A MINUTE.

11:04AM 4 AND NOW THAT WE HAVE THAT, MR. SONNIER WILL SIMPLY SAY
11:04AM 5 THAT THAT WOULD HAVE WORKED UNDER HIS EXPERT OPINION.

11:04AM 6 SO EXPERTS HAVE KNOWLEDGE OF FACTS ALL OF THE TIME THAT
11:04AM 7 THEY ESTABLISH BECAUSE THEY ARE EXPERTS IN THE FIELD AND RELY
11:04AM 8 ON THAT INFORMATION.

11:04AM 9 IN THIS CASE WHAT IS RELIED ON IS A STACK OF GOVERNMENT
11:04AM 10 INTERVIEWS AND 302'S AND OTHER INFORMATION THAT THE GOVERNMENT
11:04AM 11 ITSELF PROVIDED BASED ON THEIR INVESTIGATION, AND THAT IS WHAT
11:04AM 12 YOU WOULD TYPICALLY RELY ON IF YOU WERE IN THIS FIELD.

11:04AM 13 IN TERMS OF THE ADMISSIBILITY OF THE EMAIL, AS I SAID, IT
11:04AM 14 IS AN 801 ADMISSION.

11:04AM 15 IF THIS EMAIL IS NOT ADMISSIBLE UNDER 801, A GOVERNMENT
11:04AM 16 EMPLOYEE, AN ALS SUPERVISOR WHO IS ACTING WITHIN THE SCOPE OF
11:04AM 17 HIS DUTIES AS A GOVERNMENT EMPLOYEE, THEN NOTHING EVER IS
11:04AM 18 ADMISSIBLE AND THEN 801 BECOMES A TOTALLY ONE-SIDED RULE WHERE
11:05AM 19 THE GOVERNMENT COULD ADMIT DEFENSE STATEMENTS OR DEFENDANT'S
11:05AM 20 STATEMENTS, BUT WE COULD NEVER ADMIT A GOVERNMENT EMPLOYEE'S
11:05AM 21 STATEMENT ON A RELEVANT MATTER, WHICH IS WHAT IS RELEVANT.

11:05AM 22 IN ADDITION, AS I SAID, IT COULD BE ADMISSIBLE UNDER 703.

11:05AM 23 AND IN ADDITION, IT SIMPLY IS NOTICE TO THE GOVERNMENT OF
11:05AM 24 AN OPTION THAT THEY HAD, THAT MR. SONNIER SAID -- WILL SAY
11:05AM 25 WOULD WORK.

11:05AM 1 SO THIS RELITIGATING OF THE LIS MOTION, I DON'T THINK I
11:05AM 2 UNDERSTAND. I MEAN, I UNDERSTAND THE GOVERNMENT WANTS TO CUT
11:05AM 3 OUT THE HEART OF MR. SONNIER'S OPINION BY HAVING HIM TESTIFY,
11:05AM 4 BUT IF HE COULDN'T TESTIFY ABOUT THIS EMAIL, EITHER ORALLY OR
11:05AM 5 BY ADMITTING IT, THEN THAT ERADICATES WHAT THE COURT HAS
11:05AM 6 ALREADY RULED AND THERE WOULD BE NO PURPOSE, RIGHT?

11:05AM 7 THE COURT: SO HE'S GOING TO SAY IT'S -- SOMETHING
11:05AM 8 TO THE EFFECT OF, I UNDERSTAND THAT THE GOVERNMENT HAD A
11:05AM 9 CHARRETTE, A DISCUSSION ABOUT THIS, AND THAT THE GOVERNMENT,
11:05AM 10 FROM MY INFORMATION, CHOSE NOT TO DO X, WHATEVER IT IS. MY
11:06AM 11 EXPERT OPINION IS THAT THEY COULD HAVE, NOT SHOULD HAVE, BUT
11:06AM 12 THEY COULD HAVE RECONSTRUCTED THE LIS AT THIS TIME.

11:06AM 13 MR. COOPERSMITH: SIMPLY PUT, YOUR HONOR, YES, THAT
11:06AM 14 HE UNDERSTANDS THE GOVERNMENT RECEIVED THIS EMAIL, I THINK THAT
11:06AM 15 EMAIL IS ADMISSIBLE.

11:06AM 16 AND HE TOLD THE GOVERNMENT, YOU HAVE CERTAIN OPTIONS, ONE
11:06AM 17 IS TO GET THE SERVERS. AND HE'S GOING TO SAY THAT IS THE
11:06AM 18 OPTION THAT WOULD WORK, RIGHT.

11:06AM 19 THAT'S IT. THAT'S THE GIST OF IT.

11:06AM 20 THE COURT: MR. BOSTIC EXPRESSED SOME CONCERN ABOUT
11:06AM 21 HIM TESTIFYING ABOUT THE EVIDENCE BASED ON THE READING OF
11:06AM 22 WHATEVER, HE WOULD THEN BECOME A DECLARANT, HISTORICAL
11:06AM 23 DECLARANT ABOUT WHAT HAPPENED IN THE PROCESS.

11:06AM 24 DO YOU INTEND, OR IF YOU WANT TO ANSWER THE QUESTION, BUT
11:06AM 25 IS THAT SOMETHING THAT YOU ENVISION HIM DOING, BEING A

11:06AM 1 HISTORICAL REPORTER ABOUT THINGS?

11:06AM 2 MR. COOPERSMITH: I DON'T THINK IT'S FAIR TO
11:06AM 3 CHARACTERIZE HIM AS AN HISTORICAL REPORTER, BECAUSE AS WE ALL
11:07AM 4 KNOW, LIKE ANY EXPERT, HE DOESN'T HAVE PERSONAL KNOWLEDGE OF
11:07AM 5 THESE EVENTS.

11:07AM 6 WHAT HE WILL DO IS TALK ABOUT THE EVENTS THAT HE'S BEEN
11:07AM 7 MADE AWARE OF, AS RULE 703 ALLOWS, TO THE EXTENT THAT THEY FORM
11:07AM 8 THE BASIS OF HIS OPINION; RIGHT?

11:07AM 9 AND WHAT FORMS THE BASIS OF HIS OPINION IS THAT HE KNOWS
11:07AM 10 IT WAS AN LIS SYSTEM; HE KNOWS IT WAS A MICROSOFT SQL SERVER
11:07AM 11 SYSTEM; HE KNOWS THAT, IN AUGUST OF 2018, THAT THERANOS HAD THE
11:07AM 12 SYSTEM; THAT THERANOS DISMANTLED THE SYSTEM -- NOT THE
11:07AM 13 GOVERNMENT, THERANOS -- AND THAT UPON DISMANTLING IT OR RIGHT
11:07AM 14 BEFORE DISMANTLING IT, THERANOS PROVIDED A COPY OF THE LIS DATA
11:07AM 15 TO THE GOVERNMENT; THAT THAT COPY IS NOT ABLE TO BE ACCESSED
11:07AM 16 WITHOUT THE ENCRYPTION KEY; THAT THE DEFENSE GOT A COPY AND IT
11:07AM 17 IS NOT ABLE TO BE ACCESSED WITHOUT THE ENCRYPTION KEY.

11:07AM 18 AND FINALLY, YOUR HONOR, THAT HE RECEIVED AN EMAIL, THAT
11:07AM 19 HE'S AWARE OF AN EMAIL THAT WAS SENT FROM THE ALS SUPERVISOR TO
11:07AM 20 THE GOVERNMENT THAT SAID, HERE ARE OPTIONS TO TRY TO RESURRECT
11:08AM 21 THIS SYSTEM, AND ONE OF THE OPTIONS WAS TO GO AND GET THE
11:08AM 22 SERVERS, AND HE'S GOING TO SAY THAT WOULD HAVE WORKED.

11:08AM 23 AND THAT'S REALLY THE SUM TOTAL OF HIS TESTIMONY.

11:08AM 24 THE COURT: OKAY. ALL RIGHT. THANK YOU.

11:08AM 25 MR. BOSTIC, ANYTHING ELSE.

11:08AM 1 MR. BOSTIC: NO, YOUR HONOR. I THINK THIS

11:08AM 2 DISCUSSION HAS BEEN HELPFUL.

11:08AM 3 THE COURT MAY HEAR SOME OBJECTIONS FROM THE GOVERNMENT IF

11:08AM 4 THIS EVIDENCE IS PROFFERED, AND IT WOULD BE HELPFUL FOR THE

11:08AM 5 GOVERNMENT TO UNDERSTAND IN THE MOMENT THE PURPOSE FOR WHICH

11:08AM 6 THE EVIDENCE IS COMING IN, WHETHER IT'S COMING IN FOR NOTICE OR

11:08AM 7 SOME OTHER PURPOSE.

11:08AM 8 SO THAT WILL BE THE REASON WHY THE GOVERNMENT IS

11:08AM 9 OBJECTING, SO THAT WE CAN RETAIN CONSISTENT DURING THE CROSS.

11:08AM 10 THE COURT: SURE.

11:08AM 11 MR. BOSTIC: I'LL ALSO JUST POINT OUT THAT I THINK

11:08AM 12 THE COURT RESERVED A RULING ON THE ADMISSIBILITY OF THE EMAIL

11:08AM 13 THAT MR. COOPERSMITH IS REFERENCING. I'M PRETTY SURE.

11:08AM 14 SO I'M NOT SEEKING TO RELITIGATE ANYTHING. I'M JUST

11:08AM 15 POINTING OUT THAT AN EMAIL LIKE THAT --

11:08AM 16 THE COURT: RIGHT.

11:08AM 17 MR. BOSTIC: -- I DON'T THINK THE COURT HAS RULED

11:08AM 18 SPECIFICALLY ON IT.

11:08AM 19 AND IF IT'S COMING IN FOR NOTICE TO THE PROSECUTION OR TO

11:08AM 20 SHOW KNOWLEDGE, THEN I JUST WANT TO FLAG FOR THE COURT, I THINK

11:09AM 21 THAT WOULD OPEN THE DOOR TO OTHER DOCUMENTS COMING IN FOR A

11:09AM 22 SIMILAR PURPOSE.

11:09AM 23 THE COURT: WELL, WE'VE HAD THAT DISCUSSION AND THE

11:09AM 24 COURT HAS RECOGNIZED THAT IN ITS MIL ORDERS, AS WELL AS SOME

11:09AM 25 CONVERSATION ON 1464, AND CERTAINLY IN THE COLLOQUY THAT I HAVE

11:09AM 1 ENJOYED WITH ALL COUNSEL THROUGHOUT THE CASE REGARDING THIS
11:09AM 2 ISSUE.

11:09AM 3 OKAY. ANYTHING ELSE?

11:09AM 4 MR. COOPERSMITH: I'LL JUST SAY -- JUST ONE OTHER
11:09AM 5 THING TO QUICKLY RESPOND TO MR. BOSTIC.

11:09AM 6 YOU KNOW, I THINK WHAT IS GOOD FOR THE GOOSE IS GOOD FOR
11:09AM 7 THE GANDER, AS THEY SAY, AND IF MR. BOSTIC -- IT SOUNDS LIKE HE
11:09AM 8 WANTS TO LIMIT OUR FACTUAL PRESENTATION, AND THAT'S FINE, AND
11:09AM 9 WE'LL STAY IN THE LANE.

11:09AM 10 BUT HE'S NOT GOING TO BE ABLE TO ASK QUESTIONS OF
11:09AM 11 MR. SONNIER THAT ARE NOT WITHIN HIS PERSONAL KNOWLEDGE TRYING
11:09AM 12 TO -- I DON'T KNOW WHAT MR. BOSTIC HAS IN MIND EXACTLY, BUT IF
11:09AM 13 IT'S ATTRIBUTING FAULT TO MR. BALWANI OR SOMETHING OF THAT
11:09AM 14 NATURE, I THINK THE COURT HAS ALREADY RULED THAT'S NOT
11:09AM 15 PERMISSIBLE.

11:09AM 16 CERTAINLY HE CAN ASK CROSS-EXAMINATION QUESTIONS, BUT I
11:10AM 17 THINK THERE ARE BOUNDARIES AND LIMITS TO WHAT HE CAN INSINUATE
11:10AM 18 IN CROSS OF MR. SONNIER.

11:10AM 19 MR. BOSTIC: WE UNDERSTAND AND WILL ABIDE BY THE
11:10AM 20 COURT'S RULINGS.

11:10AM 21 THE COURT: GREAT.

11:10AM 22 THANK YOU VERY MUCH. WE'LL SEE YOU TOMORROW. THANK YOU.

11:10AM 23 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:15AM 24 (COURT CONCLUDED AT 11:15 A.M.)

25

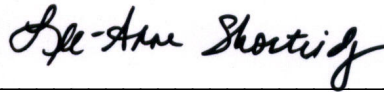
CERTIFICATE OF REPORTERS

WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.



IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8076



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JUNE 6, 2022